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Nos. 80-848, 80-883

IN THE

Supreme Court of the United States

October Term, 1980

PIPER AIRCRAFT COMPANY, a Corporation,
Petitioner,

v.

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, et al.,
Respondent.

HARTZELL PROPELLER, INC.,
Petitioner,

v.

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, et al.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

CONSOLIDATED JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 21, 1977—Plaintiff's original Complaint filed in the Superior Court of the State of California for the County of Los Angeles.

August 24, 1977—Petition for Removal to the United States District Court for the Central District of California filed.

August 30, 1977—Motion of Defendant Hartzell Propeller, Inc. to Dismiss for Lack of Jurisdiction Over the Person or for Transfer filed.

December 21, 1977—Order entered quashing service of process as to Hartzell Propeller, Inc. and transferring the action to the United States District Court for the Middle District of Pennsylvania.

May 15, 1978—Motion of Defendant Hartzell Propeller, Inc. to Dismiss filed.

May 15, 1978—Motion of Defendant Piper Aircraft Company for Judgment on the Pleadings or for Summary Judgment filed.

October 19, 1979—Order entered dismissing the action on condition that Defendants consent to jurisdiction of the Scottish courts and waive any statute of limitations defense.

December 7, 1979—Plaintiff's notice of appeal filed.

July 24, 1980—Opinion and Judgment of the United States Court of Appeals for the Third Circuit entered.

August 27, 1980—Order entered denying the petition of Hartzell Propeller, Inc. for rehearing *en banc*.

September 15, 1980—Order entered amending the Opinion of the Court of Appeals.

IN THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 77-3181-IH

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter C[illegible]ningham Scott,

Plaintiff

v.

PIPER AIRCRAFT COMPANY, a Corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a Corporation

Defendants

NOTICE OF MOTION AND MOTION OF DEFENDANT HARTZELL PROPELLER, INC. TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON OR FOR TRANSFER

Filed August 30, 1977

To Plaintiffs and to Their Respective Counsel of Record, Magana & Cathcart:

PLEASE TAKE NOTICE that the undersigned will bring a Motion to Dismiss for Lack of Jurisdiction Over the Person (FRCP § 12(b)) and Motion for Transfer Under 28 USCA § 1404(a) on for hearing before the above-entitled Court at Room 2, United States Court House, 312 North Spring Street, Los Angeles, California 90012, on

the 3rd day of October, 1977, at the hour of 10:00 a.m., or as soon thereafter as counsel can be heard, before the Honorable Irving Hill.

The defendant, HARTZELL PROPELLER, INC., a corporation, will move the Court as follows:

1. To dismiss this action on the grounds that defendant, HARTZELL PROPELLER, INC., is a corporation organized under the laws of the State of Ohio, with the principal place of business in the State of Ohio, and was not and is not subject to the personal jurisdiction of the United States District Court, Central District of California, and of which more clearly appears in the Affidavit of Mr. Richard Grimes, submitted herewith.

2. In the alternative, to transfer said action to the United States District Court, District of Pennsylvania, for the convenience of parties and witnesses, in the interest of justice.

• • •

ORDER QUASHING SERVICE OF PROCESS AS TO DEFENDANT HARTZELL AND TRANSFERRING ACTION TO MIDDLE DISTRICT OF PENNSYLVANIA UNDER 28 U. S. C. § 1404(a)

Filed December 21, 1977

[caption omitted in printing]

There came before the Court on December 12, 1977, for hearing the following motions:

1. Motion of Defendant Hartzell Propeller, Inc., filed August 30, 1977, to dismiss or in the alternative transfer the action.

2. Motion of Defendant Piper Aircraft Company, filed November 23, 1977, to transfer the action to the Eastern District of Pennsylvania under the provisions of § 1404(a). Since the hearing, the Court is advised that the reference in said motion to the Eastern District of Pennsylvania was a clerical error and that, as counsel for all parties agree, the motion was intended to refer to the Middle District of Pennsylvania at Williamsport.

• • •

The Court having heard argument and having considered the various Points and Authorities and other documents filed in support of and in opposition to said motions, ORDERS AS FOLLOWS:

1. The motion of Defendant Hartzell Propeller, Inc. to dismiss for lack of personal jurisdiction, is treated by the Court as a motion to quash service of said Defendant and is granted. The Court finds that the exercise of personal jurisdiction over said Defendant under the facts and circumstances of this case is not in accord with due process and is not authorized by the California long arm statute.

Cf. L. D. Reeder Contractors of Arizona v. Higgins Industries, 265 F. 2d 768 (9th Cir. 1959). The Court declines to dismiss the action as to said Defendant Hartzell in view of its order hereinafter set forth transferring the action to the Middle District of Pennsylvania in which valid service of said Defendant Hartzell can be obtained.

2. The Court grants the said motion of Defendant Piper Aircraft Company to transfer the action under 28 U. S. C. § 1404(a). The Court finds that the instant action could have been brought in said District and that the transfer of the action to said District is for the convenience of parties and witnesses and in the interest of justice. The action is ORDERED forthwith transferred to the United States District Court for the Middle District of Pennsylvania at Williamsport.

3. In the event of any appeal from either of the orders embodied herein, the Court ORDERS that a transcript of the proceedings in open court on December 12, 1977, shall be ordered by the appellant and made a part of the record on appeal.

4. The Clerk shall transmit a copy of this Order by United States mail to counsel for all parties.

DATED: December 21, 1977.

/s/ IRVING HILL
Irving Hill, *Judge*
United States District Court

MOTION OF DEFENDANT HARTZELL PROPELLER, INC. TO DISMISS AND EXHIBIT "A" THERETO

Filed May 15, 1978

[caption omitted in printing]

AND Now, to wit, this day of May, 1978, comes defendant, Hartzell Propeller, Inc. and moves this Honorable Court for an Order dismissing the Complaint on the following grounds:

1. Although the action brought by plaintiff sounds in wrongful death and purports to be on behalf of the Estates of the decedents in an aircraft accident, there is no wrongful death action in Scotland, no action may be brought under Scottish law for the death of a decedent such as is attempted to be brought here and the proper law to be applied to the case is the law of Scotland. (See Affidavit "B").

2. The Complaint sounds, inter alia, in strict liability in tort, where the applicable law, the law of Scotland, does not recognize the concept of strict liability in tort and would not apply such law. (See Affidavit "B").

3. The accident which caused the deaths of the decedents in Scotland appears to have been caused at least in part by improper maintenance of the aircraft and at least in part by improper operation of the aircraft. (See Affidavit "A", paragraphs 8, 9 and 10).

4. Service of process upon the company which had maintained the aircraft and upon the company which was operating it in commerce as an air taxi carrier does not appear possible within the United States but does appear possible in Scotland. (See Affidavit "A", paragraphs 2, 3 and 4).

5. That all parties necessary to the complete disposition of this matter can be brought before the Court in Scotland.

6. That all witnesses to the accident and most witnesses involved in the case are residents and citizens of England or Scotland and it would therefore be extremely inconvenient and unnecessarily expensive to try the case in the United States.

7. That no prejudice will be occasioned to any parties by reason of dismissing this action and allowing a subsequent action to be brought in Scotland.

WHEREFORE, Hartzell Propeller, Inc. prays this Honorable Court to enter an Order dismissing plaintiff's Complaint. And defendant will ever pray, etc.

Exhibit "A"

[caption omitted in printing]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

RONALD C. SCOTT, first being sworn, deposes and says that he is a member of the Bar of the Supreme Court of Pennsylvania, having attorney identification no. 13494, and that he is attorney for defendant, Hartzell Propeller, Inc., and is authorized to take this affidavit; that he has conducted an investigation into the accident from which this litigation arises and that the facts set forth below are true to the best of his knowledge, information and belief:

1. The aircraft involved in the accident, in which plaintiff's decedents appear to have been killed, had been manufactured in Pennsylvania prior to 1970 and sold to an American aircraft dealer.

2. That the aircraft involved in the accident was and had for a long time been owned, operated and maintained by an English air charter company which does not appear to do business in the United States.

3. That the pilot of the aircraft was a commercial pilot, a citizen and resident of Scotland and in the employ and within the course and scope of his employment as a pilot for a Scottish air taxi company, which does not appear subject to service of process in the United States.

4. That all maintenance on the aircraft for several years prior to the accident appears to have been done in Great Britain with none of it accomplished in the United States.

5. That, at the time of the accident, the aircraft was on a commercial air charter within the British Isles and was flying from England to Scotland.

6. That the accident here involved occurred in Scotland.

7. That all of the decedents appear to have been citizens and residents of Scotland.

8. That the British Department of Trade investigators found post accident indications that the nuts on all four of the mounting bolts of the propeller governor were loosened to the point at which a substantial loss of oil would occur, completely depleting the engine's oil supply in a matter of minutes.

9. That the British Department of Trade investigators found signs at the site of the accident which could be interpreted to indicate that the engine with the four loosened nuts and presumed oil leak was not developing power when the aircraft crashed.

10. That the British Department of Trade investigators found signs at the accident scene which could be interpreted as indicating that the aircraft had struck the ground in a tail spin after the pilot lost control of the aircraft upon losing power in the one engine.

11. That he has consulted with Hartzell Propeller, Inc. and with counsel for Piper Aircraft Corporation, the only two defendants who have been served in this matter, and has obtained their agreement to accept service of process in an action on behalf of the proper parties which is promptly and timely brought in Scotland.

12. That he has determined that the statute of limitations for bringing an action arising out of this accident in Scotland has not yet expired.

13. That the wreckage of the aircraft, all witnesses to the accident and subsequent investigation and all witnesses on issues relating to damages are in the British Isles and available to an action in Scotland.

/s/ RONALD C. SCOTT
Ronald C. Scott

[jurat omitted in printing]

Exhibit "B"

I, CHARLES KEMP DAVIDSON, Queen's Counsel (Scotland) depone as follows: I have been in regular practice before the Supreme Courts of Scotland for twenty two years. I graduated as Bachelor of Laws (with distinction) from the University of Edinburgh in 1956, and in the same year I was admitted to the Faculty of Advocates. I was appointed Queen's Counsel (Scotland) in 1969, and in 1977 I was elected Vice Dean of the Faculty of Advocates. In the course of professional practice I have had extensive experience in the handling of actions of damages in respect of personal injuries and death. In particular I am familiar with the Law of Scotland pertinent to the issues raised by the Edinburgh firm of Shepherd & Wedderburn, W. S. and Pennsylvania attorney, Ronald C. Scott, Esquire.

My opinion has been sought regarding certain legal aspects of claims arising out of an aircraft accident which occurred in Scotland killing six Scottish citizens and residents including the pilot. The aircraft had been built in Pennsylvania, U. S. A., equipped with engines built in Pennsylvania, U. S. A., and propellers built in Ohio, U. S. A. The aircraft involved was being piloted by a Scottish pilot who was in the employ of a Scottish aviation service. The aircraft in question may have been owned and maintained by an English air service. The survivors of the decedents are presumed to be Scottish citizens and residents.

In the above context, I have been asked the following questions and make the following answers:

1. *Question*: What body of law would the Scottish Courts apply for the purpose of assessing damages which might flow from the losses occasioned by the accident, Scottish, English, Pennsylvania or Ohio law?

Answer: In relation to both heads and *quantum* of damages the law of Scotland would be applied. I refer to *Mitchell v. McCulloch* 1976 S. L. T. 2, and authorities cited therein.

2. *Question*: Under the law of Scotland, does a cause of action exist on behalf of the estate of a decedent or which may be brought by a personal representative of a decedent for damages arising from the death of a decedent?

Answer: No. No such cause of action or claim exists under Scottish law.

3. *Question*: Is there a statute of limitations upon time within which claims may be brought by survivors for damages occasioned by the death of a decedent and, if so, what is that period?

Answer: Yes. As a general rule the period of limitation is three years from the date of death. I refer to section 17(1)(b) of the Prescription and Limitation (Scotland) Act, 1973. Exceptions to the general rule are not in point in the present case.

/s/ C. K. DAVIDSON
Davidson

[jurat omitted in printing]

MOTION OF DEFENDANT PIPER AIRCRAFT COMPANY FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

Filed May 15, 1978

[caption omitted in printing]

Defendant Piper Aircraft Company, by its undersigned attorney and pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure, hereby moves this Court for Judgment of the Pleadings or, in the alternative, for Summary Judgment, in this case on the following grounds:

(A) The Plaintiff Gaynell Reyno lacks standing to bring this action and is not qualified to act as the personal representative of the Estates of William Fehilly, Liam Stuart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott, in that she is not a relative of any of the decedents or their heirs;

(B) The complaint in this matter which sounds, *inter alia*, in strict liability in tort, fails to state a claim upon which relief can be granted because the law of Scotland does not recognize the theory of products liability;

(C) The complaint in this matter sounds in wrongful death, but there is no wrongful death action under the laws of Scotland and the laws of Scotland do not provide for an action based on the death of a decedent as is attempted by Plaintiff herein.

(D) This action should be dismissed on the ground of forum non conveniens because this action could have and should have been brought in Scotland.

(E) This action should be dismissed for failure to join an indispensable party.

Respectfully submitted,

By /s/ Charles J. McKelvey
Charles J. McKelvey
McNerney, Page, Vanderlin & Hall

AFFIDAVIT OF CHARLES J. McKELVEY

Filed May 24, 1978

[caption omitted in printing]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF LYCOMING } *ss.:*

CHARLES J. MCKELVEY, first being sworn, deposes and says that he is an attorney with the firm of McNerney, Page, Vanderlin & Hall, located in Williamsport, Pennsylvania and represents Piper Aircraft Corporation in the above matter; that he is familiar with the suit on behalf of Gaynell Reyno and has undertaken an investigation of the facts involved in this litigation, and that the facts set forth below are true to the best of his information, knowledge and belief:

1. The aircraft accident giving rise to this action occurred in Tulla, Scotland.

2. The pilot of the aircraft was a citizen and resident of Scotland and was an employee of, and acting within the course of his employment for, a Scottish air-taxi company.

3. All persons aboard the aircraft at the time of the accident were citizens and residents of Scotland. All of the heirs and next of kin of said decedents are citizens and residents of Scotland.

4. The aircraft involved in this litigation bore British registration mark G-AYSF and was owned, operated, and maintained by a Scottish air-taxi company which is not subject to service of process in the United States.

5. All maintenance on the aircraft for the several years prior to the accident appears to have been done in Scotland or England.

6. The wreckage of the aircraft involved in this litigation is located in the British Isles and/or Scotland, and is in the possession of the British Department of Trade Investigators. It appears that the officials of the British Department of Trade Investigators is unwilling to release any of the remaining portions of the airplane to any of the parties involved in this litigation.

7. The aircraft accident involved in this litigation was investigated by a team of investigators employed by the British and/or Scottish government. The report of their investigation is located in Scotland and/or the British Isles, and the officials investigating the accident have indicated great reluctance to discuss their findings or facts with any of the persons associated with this law suit.

8. All of the evidence with respect to the damages suffered by the heirs and next of kin of decedents is located in Scotland.

9. All witnesses to the accident and subsequent investigation are located in Scotland or England and would be available to an action in Scotland.

10. The aircraft which was involved in this accident was used for commercial purposes including the transportation of passengers for hire in Scotland.

11. I have been in contact with a Scottish barrister concerning the law of Scotland in cases of this nature. The law of Scotland does not recognize a cause of action for, or the theory of, products liability. I am in the process of obtaining an affidavit from this Scottish barrister with respect to Scottish law, but administrative and transpor-

tation difficulties have caused certain delays in my receipt of this affidavit.

12. Under the laws of Scotland, the Plaintiff Gaynell Reyno would not have standing to bring this action or be qualified as the personal representative of the real parties and interests here, the heirs and next of kin of the decedents involved in the aircraft accident.

13. The named Plaintiff in this case, Gaynell Reyno, is a citizen and resident of California and is not related to any of the heirs or next of kin of the decedents or to the decedents themselves.

14. I have consulted with Piper Aircraft Corporation and counsel for Hartzell Propeller, Inc., the only remaining Defendants in this action, and have obtained their agreement to accept service of process in an action brought on behalf of the proper parties which is timely brought in Scotland.

/s/ CHARLES J. MCKELVEY
Charles J. McKelvey

[jurat omitted in printing]

[certificate of service omitted in printing]

AFFIDAVIT OF DONALD IAN KERR MacLEOD

Filed May 25, 1978

[caption omitted in printing]

I, DONALD IAN KERR MACLEOD of 33 Lockharton Avenue, Edinburgh, 14, Scotland, make oath and say as follows:

1. I am a Writer to the Signet and also Senior Litigation Partner in the firm of Shepherd & Wedderburn, Solicitors and Notaries practising at 16 Charlotte Square, Edinburgh, 2.

2. I have been asked to advise upon the position under Scots Law in relation to claims arising as a result of the crash of a Piper Aircraft in the Moffat Hills at Firthybrig Head on 26th July 1976.

3. Firstly, upon the question of products liability while there is no absolute liability on the manufacturer of a defective product liability can nonetheless be brought home if negligence on the part of the manufacturer can be established. Upon proof of negligence full damages will follow.

4. In relation to claims for damages arising out of fatal accidents Scots Law is now regulated by the Damages (Scotland) Act 1976 which came into force on 13th May 1976. As the accident giving rise to the claims occurred in July 1976 the claims fall to be dealt with in terms of the 1976 Act.

5. The basis rule under the Act is that the Executor of the deceased may only sue in respect of patrimonial losses suffered by the estate. In practice these would be limited to the funeral account and (in some cases) the cost of repairs to a motor vehicle. All other claims on behalf of relatives or dependents of the deceased must be brought by these parties themselves and must,

in addition, be brought in one action. There are provisions in Section 5 of the 1976 Act designed to prevent a multiplicity of actions.

6. Claims by relatives or dependents fall into two classes. These are:

   (1) Damages for Loss of Support. These damages are stated to be such as will compensate the relative for any loss of support suffered by him since the date of the deceased's death or likely to be suffered by him as a result of the death. The relatives who can make such a claim for loss of support are defined in Schedule 1 to the 1976 Act and comprise (A) the spouse (B) parent or child of the deceased (C) any person accepted by the deceased as a child of his family (D) ascendants and descendants (other than parents or children) of the deceased (E) brothers, sisters, uncles or aunts (or their issue) of the deceased (F) a divorced spouse of the deceased. No other person has any right to claim damages for loss of support.

   (2) Damages for Loss of Society. These damages are general damages by way of compensation for the loss of the society and guidance of the deceased. Damages under this head can in terms of Section 10(2) of the 1976 Act only be claimed by persons who were at the date of death (A) a spouse of the deceased (B) a parent or child of the deceased or (C) a person accepted by the deceased as a child of his family.

   No other claims for damages are competent.

7. I am informed and from a perusal of the papers verily believe that a person who may or may not have ob-

tained a Grant of Probate or Letters of Administration is pursuing the claims of the relatives before the US Courts. Such an action would not be competent in Scots Law. As mentioned above the claims of the relatives must be brought on their own behalf and the action must be brought by or intimated to all persons who have or may have right to claim. In that situation a separate action would be required in Scotland in respect of each deceased person.

[jurat omitted in printing]

[certificate of service omitted in printing]

TRANSCRIPT OF ORAL ARGUMENT BEFORE THE DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES McDOUGALL STORM, DAVIS VINCENT MORAN and PETER CUNNINGHAM SCOTT

v.

PIPER AIRCRAFT COMPANY, a corporation, AVCO LYCOMING ENGINE DIVISION, a Division of Avco Corporation, HARTZELL PROPELLER, INC., a corporation

Transcript of Proceedings
Argument

Before: Hon. R. Dixon Herman, J.
Date: September 13, 1978
Place: Federal Building
Harrisburg, Pennsylvania

COUNSEL PRESENT:

MICHAEL D. MOORHEAD, ESQUIRE
For—Plaintiffs

RONALD C. SCOTT, ESQUIRE
For—Defendant Hartzell

CHARLES J. McKELVEY, ESQUIRE
For—Defendant Piper

Virginia Loria
Official Reporter

[2]

THE COURT: This is a case that was transferred to me rather recently and I'm not as familiar with it as I would like to be. And I would like to know whose motion is to be argued first here, is there more than one motion to be argued and who has the laboring oar?

MR. SCOTT: I think I am first. I am Ronald Scott and I represent Hartzell Propeller and ours was the first motion filed.

Shortly after us, Piper Aircraft filed a similar motion.

THE COURT: Are these the motions to dismiss?

MR. SCOTT: Yes, sir.

THE COURT: Or motions for summary judgment?

MR. SCOTT: Ours is a motion to dismiss purely based upon forum non conveniens.

THE COURT: Hartzell's?

MR. SCOTT: Hartzell's, yes, sir. Piper's is to dismiss or summary judgment, essentially the same motion.

THE COURT: Then there was a later motion I believe by plaintiffs.

MR. MOORHEAD: No, your Honor, we are just responding to the motion made by defendants.

THE COURT: Very well, whoever wants to begin and you stand wherever it is convenient for you to stand and give me a little history of this case before you go into your legal argument.

[3]

As I understand, this was an airplane accident somewhere near Europe or the North Sea or someplace like that and a number of people lost their lives.

MR. SCOTT: Yes, sir.

THE COURT: And it is the representative of these people suing Piper Aircraft. And is the original action against Piper as well as Hartzell.

MR. SCOTT: Yes, your Honor.

THE COURT: Hartzell was not brought in by Piper?

MR. SCOTT: No, sir.

THE COURT: You may proceed.

MR. SCOTT: If I may, I will start right at the top with the background of the accident. In 1968 Piper Aircraft Corporation built a PA 23 aircraft which is a twin-engine, six place aircraft with Hartzell propellers on it.

THE COURT: What did they call that?

MR. SCOTT: They called that the Aztec. It was sold by Piper, I understand, to an Ohio dealer in 1968.

Some time thereafter—and for reasons that we will mention a little bit later—we don't know exactly when but some time apparently in the early 1970's—

THE COURT: It was sold new to this dealer?

MR. SCOTT: Yes, sir. Some time in the early 1970's this aircraft was sold abroad to a British aircraft operating company. It was involved in an aircraft accident near Tulla,

[4]

Scotland, which is just south of Edinburgh.

THE COURT: Were these engines straight reciprocal engines, no fuel injection or anything like that?

MR. SCOTT: They were Avco Lycoming six-cylinder reciprocating engine, 250 horsepower engines. Avco Ly-

coming, according to my file, has been dismissed from this action by stipulation.

MR. MOORHEAD: That's correct.

MR. SCOTT: All that remains in the case as defendants are Hartzell Propeller and Piper Aircraft Corporation.

In the spring of 1976, this aircraft was owned by a Blackpool based, Blackpool, England air—apparently what we would call an air taxi company or perhaps a fixed-base operator.

They would lease this aircraft out. On the day of the accident, a Scottish pilot in the employ of a Scottish air taxi company had five passengers in an Aztec, a different one, that flew from I think Dundee in Scotland north of Edinburgh, down to Blackpool and they had a circuit to follow. They had three or four stops to make over the course of the day.

Their aircraft went down in Blackpool and they changed to this aircraft that was later involved.

THE COURT: You would say this was a normal landing?

MR. SCOTT: It was a normal landing but it broke, they couldn't get it off. For some reason or another, we don't know

[5]

why, but just based upon the report of the British Department of Trade, they changed aircraft. And the pilot from the Scottish air carrier simply leased this aircraft from the Blackpool company. I don't know whether there was any connection between them or not.

They flew that all day, came back to Blackpool, expecting to find their aircraft back in commission, it wasn't. So they went back into the airplane that they had been flying all day.

They took off—do I understand that you have some flying experience?

THE COURT: Yes.

MR. SCOTT: They filed IFR out of Blackpool and they got about a third of the way along and found that their radios, they weren't getting proper reception. They suspected it was their own gear, so they cancelled IFR and filed VFR. They were in radio contact as they went over the border into Scotland and the highlands started coming up to them.

The last that was heard of this aircraft was that they reported they were climbing from three thousand feet at which they were below the overcast to thirty-five hundred feet at which they were above the overcast. This was about 50 minutes after they had taken off. And they were near Tulla, which is just north of the border. They were into Scottish territory.

[6]

The next thing that was found was this aircraft wreckage on the ground with indications on it: One, that it had entered a spin and apparently a flat spin. It had come down nearly vertically with a lot of rotation on it. There were indications of no power and possibly no rotation on the left engine. There were indications of power and definite rotation on the right engine.

The propeller locks which are devices that keep the propeller from feathering when you shut the engine down were found engaged on the left engine. This could have happened at the time of impact or it could not have. But nobody knows one way or the other. And that was about it.

Except for one apparently very significant feature that the investigators found on the left engine. The pro-

peller was a constant speed propeller. It was driven, controlled by a governor, which is run by engine oil. This governor has a little pump in it, it has high pressure engine oil going into it and it increases the pressure of the oil and it controls the pitch of the propeller hydraulically.

THE COURT: The pilot controls it, doesn't he?

MR. SCOTT: The pilot controls the governor, he has an input into the governor itself but the governor sets the pitch of the propeller so that the selected rpm will be maintained.

There are four mounting bolts for this governor on the

[7]

engine. All four of those bolts were found backed off approximately equally. There were marks on the governor itself, on the metal of the governor made by the star washers indicating that those nuts had at some time been torqued down sufficiently to bite into the metal. And yet all four of those nuts were found backed off approximately equally.

There were tests run by the British Department of Trade investigator. He found that the space that was between the governor and the engine block was sufficient to allow the entire capacity of engine oil to escape in seven minutes. Which means that somehow, some time during that flight, apparently in the last few minutes, all four of those nuts backed off immediately. Which indicates to me a very strong probability that when the aircraft was on the ground, a mechanic had started them off.

At any rate that—at least somebody that we can't reach in this Court started them off. They were all killed in Scotland. They were all Scottish citizens. Their survivors are all Scottish citizens. Nevertheless, someone whom I'm told is an employee of the plaintiffs' law firm

was appointed a personal representative by a court in California and a lawsuit was started in the state court in California.

THE COURT: How did that happen, do you know?

MR. SCOTT: I don't understand California, Judge, I don't know. It certainly is not in keeping with Scottish law.

[8]

At any rate, this woman, Gaynell Reyno, was appointed by a California court as personel representative of the estates.

Action was brought in the state court in California, it was removed by Piper Aircraft Corporation, I believe, it might possibly have been Hartzell—no, I'm sorry, it wouldn't have been Hartzell, it might possibly have been Avco Lycoming. But it was one of those two, removed it to the federal court. At that point Hartzell filed a motion to dismiss or, in the alternative, a motion to transfer.

THE COURT: To where?

MR. SCOTT: I think we requested Pennsylvania if we weren't dismissed. The court found—and this is the first legally significant fact—let me read this to you: The court found that Hartzell was not in California.

And the phrasing of the order, it is attached to my reply memorandum I believe it's Exhibit A, page two. The court having heard argument and having considered the various points and authorities and other documents filed in support of and in opposition to said motion orders as follows: The motion of defendant Hartzell Propeller, Inc. to dismiss for lack of personal jurisdiction is treated by the court as a motion to quash service of said defendant and is granted.

The court finds—and this is the significant part—the court finds that the exercise of personal jurisdiction over said defendant under the facts and circumstances of this case

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is not in accord with due process and is not authorized by the California long-arm statute.

That was not appealed, that is page two of Exhibit A, paragraph numbered one. That was not appealed. It is the law of this case that Hartzell's contacts with California are insufficient to allow an action there to proceed against it under the due process clause.

I believe in my reply brief, to which that is an exhibit, you will see reference to several articles in the Cornell Law Review and this morning we were by your chambers and noted that you do have those articles right there.

THE COURT: I don't know how far back I have them.

MR. SCOTT: You do. There are 61 and 62 volumes. They are fairly long and I won't say that I understand entirely the distinctions that they are trying to make between due process and full faith and credit on the decisions.

But the one point that does come through very clearly in all of those articles and in the decisions that are discussed in them is that ever since 1920 in the Deck case, there has been a recognition that in choice of law, as well as in application of the courts in persona jurisdiction, there are due process requirements. There must be certain minimal contacts in choice of law to apply a state's law to a defendant, just as there must be certain minimum contacts and they are apparently the same, in order to apply in persona jurisdiction.

[10]

It follows then, point number two, that California law cannot constitutionally be applied to Hartzell Propeller, Inc. under the law of this case which finds that we are not there.

Therefore, since the only court where we have been served and where we are present is the District Court for the Middle District of Pennsylvania under Winesky versus Eastern Airlines, the choice of law is the grouping of the contacts. Pennsylvania rule, grouping of the contacts.

The reason I have gone into that particularly is because the choice of law is really the only point at which it appears that plaintiffs are even attempting to refute the points raised in my initial memorandum on my motion to dismiss. The Pennsylvania rule is the grouping of the contacts.

Here we have six plaintiffs—and I don't even know yet how many—decedents' survivors who are all located in Scotland. We have an accident in Scotland. We have a carrier who was running this operation commercially in Scotland who should be a party and I will come to that later.

We have the maintaining people who are at least in Great Britain, possibly in Scotland. All of them on the other side of the ocean. We have an accident that involves operation in English and Scottish air space.

The only thing that there is in Pennsylvania is that the aircraft which happened to be carrying those people at the

[11]

time they died was built some nine years earlier or eight years earlier in Pennsylvania. And that the propeller—that's really not a Pennsylvania contact, we are an Ohio corporation.

So far as choice of law is concerned, at least as to Hartzell—and it is important that a distinction be made between Piper and Hartzell—with us, it seems perfectly clear that Scottish law has got to apply. Which presents practical problems, as you are well aware, sir.

In my original motion to dismiss, I have an affidavit and there was another affidavit filed by Mr. McKelvey on behalf of Piper, the affidavit of Donald McCloud. This is my document number seven is my motion. And the affidavit of Mr. Davidson who is—I think they call him vice dean of the Edinburgh trial bar.

I sent certain questions to him and one of them, question two under the law of Scotland, does a cause of action exist on behalf of the estate of the decedent which may be brought by a personal representative of the decedent for damages arising from the death of a decedent.

And his answer, sir: No, no such cause of action or claim exists under Scottish law. This is further carried in Mr. McCloud's affidavit in which he explains the damages, such as they are, are recoverable by the survivors, the survivors' claims caused by the death of the decedents.

It follows then, sir, that Gaynell Reyno as to Hartzell

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under Scottish law which does not recognize the right of a personal representative to bring such an action, Gaynell Reyno does not have any standing to bring a lawsuit against Hartzell in Pennsylvania.

I want to talk a little bit more generally, sir, about the general business of the forum non conveniens dismissal. The leading case on that as I have cited in my brief was Gulf Oil versus Gilbert, U. S. Supreme Court 1947. And in that case the various criteria for dismissal under forum non conveniens were discussed. I'm sure your Honor is aware that the Third Circuit in the relatively recent case

against Texaco has approved forum non conveniens, that was the Jones Act case, in which actually there was a heavier burden because of the precise wording of the Jones Act upon the defendant to move the case out.

But it has been approved not only in other states and other circuits but also in this circuit. The criteria are set forth on page three of my brief and they are analyzed in cases that come on later on. I'm not going to go through all of them, sir. I do want to mention one case in particular, the Michell case, Michell versus General Motors, because it is the Northern District of Ohio and we are an Ohio corporation. And also because there is a distinction, there's a similarity that is I think sort of dramatic.

Michell involved a baby who was riding in an automobile in a GM infant loveseat. The automobile was involved in an

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accident, the child was thrown from the loveseat instead of being retained in it. In the stated pleadings, it was assumed that that was a defect on the part of GM's design and manufacture. And that design and manufacture had been done in the United States.

Nevertheless, the accident had occurred to Canadian citizens, the accident occurred in Canada. And the court dismissed, saying: Go back to Canada, it's not convenient to try the case here. All of your witnesses to the accident are there. Sure, the seat was designed in the United States and it may be that you will have to come to the United States to depose witnesses at General Motors as to how this was designed and what the manufacturing technique was. But nevertheless, the basic information, what the damages were in the area where the accident happened, how the accident happened, they are all in Canada. And the people are Canadian.

And the court—I quoted the court in two paragraphs and if you will bear with me, I would like to read them. I'm reading from page five of my memorandum. The court while recognizing that the alleged fault of General Motors occurred in the United States dismissed saying quote this court sees no reason why it or any other U. S. court should undertake the task of hearing and deciding this lawsuit involving alleged injury to Canadian plaintiffs from a Canadian accident, the trial of which will involve the application of Canadian law and

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the presentation of Canadian witnesses, whose live testimony cannot be guaranteed in this country. I think it is a pretty good analogy to the situation we have here.

The court discussed the applicability of product liability law to the accident involving the Canadian citizens. It says: If Ontario has a product liability law which is stricter against alleged tortfeasors than Ohio or Michigan law, plaintiffs should receive the benefit of that law. If, however, Ontario does not protect its citizens in this area as fully as Ohio or Michigan, the Ontario plaintiffs are not entitled to assert the more liberal United States laws as a basis for their suit. In such a case, Michigan and Ohio state interests will be fully protected since their citizens retain protection of these stringent laws and General Motors will have to conduct all of its design and manufacturing operations in light of these laws in designing and producing different infant seats for its different geographical markets. There being no countervailing government interest at stake, this should be governed by the substantive law of Ontario. Which I think bears very directly on this case.

You will see in my brief the analysis of the various considerations that have developed out of the opinion in

Gilbert and I will go through them without going through their history. You can get that in the brief.

First, is the relative ease of sources of proof.

[15]

Where can proof best be gotten. Of course, all of the witnesses to the accident, all of the witnesses to damages, all of the witnesses to maintenance of the aircraft—and this was an eight or nine year old aircraft—they are over there. We can't reach them, our subpoena can't go that far. We haven't even an opportunity to go further than the very limited investigation that the British Department of Trade conducted.

They didn't even interview, incidentally, sir, they didn't even interview any of the mechanics at the airports where this aircraft stopped over the course of that day to ask them: Did they do any work on it? I have personally spoken with the investigator in charge of this. He told me he got on the telephone and he spoke to the head man of the operation from which the plane had flown and said: Do you know whether any of your people or did any of your people work on that airplane? And he said I don't know of any work being done on the airplane. And he wrote it down: No work was done on the airplane.

That as your Honor is well aware is certainly no beginnings of an adequate investigation of the cause of the accident.

The plaintiffs, the survivors, all witnesses as to the measure of damages, what is a Scottish life worth? How do we get the testimony of that here. It is so much easier to get it over there.

All witnesses regarding the training of the pilot and

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the supervision given the pilot. This pilot, sir, had been a licensed commercial pilot for three months when this

accident happened. He had a total of 100 hours in this type aircraft, according to his log book.

THE COURT: He must have had an instrument rating.

MR. SCOTT: He had an instrument rating and it was three months old. He had just finished flight school. So far as we have been able to determine—and that's limited—we have no indication of any recurrent training having been required by the company for which he was working. Despite the fact that this man was going out under instrument conditions in an aircraft in which he should have been able to handle ordinary bad weather and ordinary emergencies.

His log book, I am told, contains no indication of his ever having had practice in coping with emergencies from the time he left flight school until the time this accident happened.

Witnesses as to that are not in the United States, they are in Scotland. All of those witnesses would be subject to compulsory process in the Scottish court. Anybody from Pennsylvania or from Ohio who would be deposed, their testimony would have to be taken by deposition anyway.

Lock Haven, where Piper Aircraft Corporation is, is far enough away that people are not simply going to be commuting, there are going to be depositions to record testimony taken.

[17]

Whether the plaintiffs' attorney has to come a one-day flight from Scotland to Pennsylvania or in a one-day flight from California to Pennsylvania really doesn't make any difference. Same thing with Piqua, Ohio, central Ohio. It's as hard to get to from California as it is from Scotland.

The second criterion is the availability of compulsory process to require the attendance of witnesses and that's covered by the location of the witnesses. We can't subpoena people over in Scotland or in England.

Congestion of the courts. This Court doesn't need any more business. That's one of the criteria that the Supreme Court talked about. They said administrative difficulties follow courts when they take on litigation in congested centers instead of its being handled at its origin. This can very well be handled over in Scotland.

Jury duty. Judge, this is a trial that's got to take a month. Should we impose upon citizens of the Middle District of Pennsylvania a month out of their lives to listen to a case and decide a case that involves no Pennsylvania interest, that is solely for the benefit of foreign citizens. It's an unreasonable burden.

Finally—or not finally—but one of the last points that the Supreme Court said in the Gilbert case, that was a diversity case, that was transferred from New York to I think West Virginia where there would be a change in law.

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They said: There's an appropriateness too in having the trial of a diversity case in a forum that is at home with the state law that must govern the case. Rather than having a court in some other forum untangle problems in conflict of laws and in laws foreign to itself.

Judge, at least as to Hartzell Propeller, Inc., Scottish law is going to have to be applied to this case and we are going to have to learn Scottish law if the case is to be tried here. I enjoy learning the law but a whole new body of law is a bit much. And I think it is a very compelling reason to send this back home.

The need to implead further parties who cannot be reached in the sending forum, this I propose is the sending

forum. The people who trained this pilot. The pilot's employer the carrying company, the people who maintained this aircraft. All of them should be parties in this lawsuit and they cannot be reached in the United States. And it is grossly unjust not to have them parties in this litigation.

If the argument is made that we could if there is a verdict handed down against us, go back to England or Scotland and try to get contribution, the measure of damages would be different handed down by an English or Scottish court on contribution to what would be encountered here. And it seems to me fairness would indicate that everything be handled under the same rules.

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Finally, the interest of a foreign nation in the events leading to the accident. And certainly, this is a commercial air flight. Great Britain has a lot of interest in the disposition of a case involving an air crash in its territory which is being operated, the aircraft is being operated, being maintained, the pilot was trained—allegedly—in its country. They have a lot of interest in that.

Of all of these points, none are refuted by the plaintiffs. All they say in their answer—first of all, they lump Piper and Hartzell together, we are defendants. We are not, I'm Hartzell, he's Piper. He has an entirely different motion. And he has different bases. I'm here the first time, he was out in California. My motion they say somehow California law should apply, California choice of law would apply to Pennsylvania rules and therefore Pennsylvania damages and Pennsylvania law would be applicable.

That doesn't apply as we saw right in the beginning. Pennsylvania law mandated by California choice of law rule cannot apply here because of the constitutional limitations, because we were not in California.

The answer filed by the plaintiffs to my reply memorandum says Van Dusen versus Barrack, Van Dusen versus Barrack, Van Dusen versus Barrack. As you know generally the rule in Van Dusen versus Barrack is where there is a transfer from one district to another, the law follows the case. That

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applies to the Van Dusen versus Barrack situation where all parties were present. I have not seen a single case in which the court applied the law of the transferor state and was affirmed on that when it was applied against a party who was not a party in the transferor state.

There are definite limitations—and you will see that in my reply brief. In the Van Dusen opinion itself, definite limitations to the power or to the rule that—I will give you a page—I'm sorry, to my answer to the reply brief. It is the last document. My motion to strike or in the alternative answer to plaintiffs' response to defendant Piper and Hartzell's reply memorandum. My motion to strike, you know the reason for that. The document that was filed simply has no bases in our rules.

But if you accept the document, if you look on page two, the thrust of Van Dusen versus Barrack was that the transfer of a case shall not work a change in the law as to any party. No party may benefit or be hurt by a transfer. However, if as plaintiffs argue the California law, choice of law, were applied by this Court against Hartzell when it has already been established that California could not apply it, the transfer would in fact change the law as to Hartzell. I have it written right in there and I don't need to bother you any more.

THE COURT: All right, I understand.

Before I take the reply to that, I would like to hear

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from Piper and then have the plaintiffs' argument at one time contra to both motions.

MR. MCKELVEY: Your Honor, my names is Charles McKelvey, I represent Piper.

THE COURT: And you are from Williamsport.

MR. MCKELVEY: Yes, sir.

Essentially Piper takes the position that the case should be dismissed on the basis of forum non conveniens, on the basis that Gaynell Reyno has no standing to sue and that the law of Scotland requires that the plaintiff prove negligence in a case of this type and that the law of Scotland should be applied to Piper in this case.

THE COURT: How does the case against you differ from that against Hartzell except for the fact that you were in the case in California and Hartzell was not. Is that the only distinction?

MR. MCKELVEY: That's the only distinction, your Honor, the airplane was built in 1968 in Lock Haven, it's an Aztec airplane.

THE COURT: The propeller was built in Ohio?

MR. MCKELVEY: That's right, and we installed the Hartzell propeller in 1968 and sold the airplane and know nothing more about it since that time, really.

THE COURT: What happened in California as far as you were concerned?

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MR. MCKELVEY: The case was brought by Gaynell Reyno against Hartzell, Piper and Avco. There were many pleadings back and forth. And as far as we were con-

cerned after Avco was let out, at some point Piper joined in a motion by Hartzell—Hartzell's motion was dismissed because of lack of jurisdiction and in the alternative transferred to the Middle District. Piper joined in the motion to transfer to the Middle District. Hartzell's case went off on jurisdiction or was dismissed in California because of lack of service.

THE COURT: Why was Piper not, didn't they get service in California on Piper?

MR. MCKELVEY: They did, and Piper never raised that issue.

THE COURT: You have enough activity in California?

MR. MCKELVEY: Apparently.

THE COURT: I would have thought Hartzell would too but apparently not.

MR. MCKELVEY: Apparently not, at least it wasn't proved. Now we are back here and I am convinced that Mr. Scott is correct that as against Hartzell the law of Scotland must be applied.

Our opponents will claim that as against Piper, products liability law of Pennsylvania must be applied. So this Court will be asked to apply negligence against Piper—or negligence against Hartzell—product liability against Piper.

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THE COURT: You mean if Scottish law has to be applied against Hartzell, there's no product liability law there, is that what you were saying?

MR. MCKELVEY: That's correct, your Honor. And we have an affidavit from the barrister in Edinburgh, Donald McCloud, it's in the file and it is uncontradicted.

And Mr. McCloud states that—point two: I have been asked to advise on the position under Scottish law in relation to claims arising as the result of the crash of the Piper aircraft in Moffat Hills of Firthybrig on July 26, 1976. Firstly, upon the question of product liability, while there is no absolute liability on the manufacture of a defective product, liability can be brought home if negligence on the part of the manufacturer can be established. So the burden vis-a-vis Hartzell is to prove negligence.

Plaintiffs claim that the burden against Piper is product liability. Two standards of law or two series of liability for the same airplane.

THE COURT: Both defense motions are in the nature of a motion to dismiss for summary judgment?

MR. MCKELVEY: Yes, your Honor.

THE COURT: There's no motion as there was in California to bring it here, there's no—I thought I saw something here of a motion to transfer still open, was it or not?

MR. MCKELVEY: We will concede, your Honor, Piper and

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Hartzell, that is if this Court dismisses it, we will accept service in Scotland and will defend the case in Scotland. The statute of limitations in Scotland does not expire until July of 1979.

MR. SCOTT: We have agreed to that, sir.

MR. MCKELVEY: The cases relied on—and I won't take up much more of your time—

THE COURT: I haven't read your briefs, obviously. This was Judge Muir's case and I had to recuse myself in a couple of other cases in which I was closely connected

with officers of one of the parties and in return this was assigned to me from him. And I have not gotten into it. This is a '77 case so I will have to read the briefs and get onto it as soon as I can.

MR. MCKELVEY: One final paragraph: The cases upon which plaintiffs rely are California cases, Reich versus Purcell, Hurtado and Harrah's Club and are appended to the memorandum of law submitted by plaintiffs' counsel.

Hurtado involved a Mexican citizen but the automobile accident occurred in Sacramento County, California. Harrah's Club is a dram shop case. The Harrah's Club is a gambling casino in Nevada advertised in California for Californians to come to Nevada and patronize Harrah's club. The defendants did—not the defendants—but two Californians did and became obviously intoxicated. Harrah's continued to serve them liquor

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and these people got back on the road and got back to California and were involved in a serious accident. Plaintiffs brought suit against Harrah's Club claiming that California should apply its dram shop act because the accident happened on the California highway. And the court said yes, apply California law in that case rather than Nevada which forbade it.

The third case, Reich versus Purcell, involved an accident which occurred in Missouri. The defendant lived in California, the plaintiff lived in Ohio. California didn't apply California law in that case, it applied the law of Ohio.

In this situation here we feel that California would apply the law of Scotland. The interests are in Scotland, the people live in Scotland, the decedents, the estates are being administered in Scotland. The accident happened

there, the witnesses are there, the necessary parties to this lawsuit are there.

We can't bring in—Mr. Scott went over this and I won't go over it all again—but we have Scotch airspace, the regulation of commercial charter aircraft, all of these are Scotch interests. The only thing against Piper, the airplane was built here ten years ago. And if this airplane were manufactured in Scotland, the plaintiffs would have to prove negligence to recover against the aircraft manufacturer.

Pennsylvania's interest here in this day and age when our jobs are being lost because of imports from Japan and

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Germany and overseas nations, Pennsylvania's interest here should be to prevent somebody from a country which requires proof of negligence to recover from coming here where there's an easier standard of proof because in the long run it makes it more expensive for the person here in Pennsylvania to do business. And eventually those jobs are lost overseas. And I think it is a compelling interest of Pennsylvania in this case where the interests, with the peculiar facts of this case to apply the laws of Scotland as far as liability is concerned.

With that I will close, your Honor.

THE COURT: All right, now let me hear from the plaintiffs.

MR. MOORHEAD: Thank you, your Honor and I would like to thank you for admitting me to appear in this case.

Your Honor, this is a forum non conveniens motion basically. They are seeking to dismiss this case, move it to Scotland based on the convenience of witnesses in the ends of justice.

Let me just stress two points before I get into it. What is the legal basis for them to succeed in such a motion, what do they have to do? They have to show that the balance is strongly in their favor, not equal, not a little bit more than equal, but strongly in their favor.

I'm going to show—I hope I show, I hope I have already shown in my papers—but I hope to just cover them

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briefly in oral argument that each and every element that they have raised that say kick this case out of their chosen forum—which is something I want to go into also. They chose this forum, we didn't. They chose Pennsylvania. But they say kick this case out of our chosen forum for the second—or if you want to say for the third time let's transfer this case to Scotland. And each and every element that they raise to transfer this case, the equities, I would say, are overwhelmingly in favor of keeping it here. Or at least if not overwhelming, they are equal, to keeping it here.

And again, what is the standard? It must be strongly in favor of the defendant. Or to put it in the words of a case that the defendants understandably have omitted to cite, this is the case of Top Form Mills versus Sociedad Nationale wherein the court states: There has been no allegation that Top Form has chosen to bring suit in the Southern District of New York in order to vex, harass or oppress the defendant and this court finds that no such motive exists. As has been noted, we should respect plaintiff's choice of forum as long as no harassment is intended, especially when the alternative forum is a foreign one.

It is thus evident that Avandero has not met its burden of showing positive evidence of unusually extreme

circumstances that material injustice is manifest and its motion must be denied.

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I'm saying they haven't met that standard and I would go in now and discuss it. First off, as to the statement of facts, I am not going to go into a detailed statement of facts, Mr. Scott covered it very well. Save and except one important procedural point that they understandably glossed over, both defendants.

And that is that they requested this case be transferred from California to Pennsylvania. They themselves requested the transfer. And in that request, let me just read to the Court some of the things they said requesting it to be sent here. Piper made this statement: The propriety of transferring the within action to Pennsylvania for the convenience of witnesses appears to overwhelm other factors in view of the apparent theories of liability as against the defendants. The material charging allegations of plaintiffs' complaint concern defective products and negligent manufacture, assembly and design. As attached reader affidavit indicates, the subject aircraft was manufactured in Pennsylvania and sold to a corporation in Ohio. Necessarily, it would seem that all material witnesses on the liability issues reside either in Pennsylvania or Ohio.

Convenience of the witnesses is furthered by considering the fact that discovery will necessarily have to take place largely within the state of Pennsylvania.

That's not us talking, your Honor, that is Piper talking, that is Piper talking in the original transfer motion.

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They continue on and cite a case again supporting their position to move it to this Court.

That case is Quandt versus Beech Aircraft Corporation, 317 Fed. Supp. 1009. The transferring court held that action by foreign citizens arising from an air crash in a foreign state favored on balance the transfer of the action to the place where the defendant manufacturer maintained its principal office and manufacturing facility.

Where is that? That's here in Pennsylvania. Now Hartzell in the same proceeding—

THE COURT: Now you say that the motions here and what you are arguing are the motions of the two defendants for a change of jurisdiction. Are you saying that's basically what they are asking for, but in that motion they asked for the case to be dismissed or judgment on the pleadings, that's what I understood.

MR. MOORHEAD: They asked I assume for it to be dismissed in favor of bringing it in Scotland.

THE COURT: All right, I haven't checked the motions yet.

MR. MOORHEAD: And they brought the same motion in California, sending it here. And that's my point. I will read further but one of our primary contentions is that they should be estopped from basically transferring this case again. It was removed from state court, federal court in California. It

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was removed at their request pursuant to 1404a from the United States District Court in the Southern District of California to this Court. And they are seeking again, okay, we have done it twice, let's do it again and send it over to Scotland.

I hesitate to think where we will go if we get to Scotland.

Let me just read to you some statements made by the defendant Hartzell in its original motion to transfer to this Court. Hartzell's original motion states: To transfer said action to the United States District Court of Pennsylvania for the convenience of all parties and all witnesses in the interest of justice.

THE COURT: How did this case get started in California, as a matter of interest. What contacts are there of anybody in California?

MR. MOORHEAD: We sincerely felt, your Honor, that all defendants, Avco Lycoming, Hartzell and Piper had sufficient contacts—more than sufficient contacts—to justify a suit in California. Unfortunately, the court in California decided as to Hartzell which was another point I want to state that they were not doing sufficient contacts there that the case—the court in California did not dismiss the action which is a fundamental flaw in their argument that California choice of law does not apply.

The action, if you will read the order, was not

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dismissed. The court declines to dismiss the action as to said defendant Hartzell—this is from this order, page two. In view of its order hereinafter set forth for transferring the action to the Middle District of Pennsylvania.

The action was not dismissed in California—which is very important. I will read into why California choice of rule—choice of law rules pursuant to Van Dusen must apply here.

At any rate, I won't belabor this. I included statements of both defendants ad nauseam. I included statements of both defendants ad nauseam in my reply paper saying why they wanted this case moved here. They went on and on about the ends of justice would be served if it

is here. The convenience of witnesses would be served if it is here. They all said that, we didn't. This was in California.

Let me go on and address the instant motion. We are here at their request and now they want to send us over to Scotland. Let me just address the point that they have raised in their motions.

Again, the balance of factors has to be strongly in favor of the transfer. And I would just invite you to keep a score card, to keep a tabulation going on the elements as dictated in Gulf Oil case as to what is necessary for the defendants to satisfy their very heavy burden to transfer a case, particularly to a foreign jurisdiction which this would involve.

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The convenience of witnesses. Both defendants have harped away that the majority of the witnesses are over in Scotland. Number one, this argument totally ignores their original statements where they say the majority of the witnesses required on liability issues are in Pennsylvania and of course Ohio, namely the people who planned the various products that we allege are defective, the people who designed those products, the people who manufactured those products, the people who installed those products originally. The list as far as in person witnesses is huge.

Now you take a look at the documentary evidence that is going to have to be produced. Where is it going to come from as to the defects we allege existed in this aircraft and proximately caused the crash. It is going to come from Pennsylvania and Ohio, not from Scotland.

Let me go on. They continue to harp also on the fact that all the witnesses on damages are in Scotland and that therefore it is unfair. That omits a very basic point.

The witnesses that are on damages in this case are the plaintiffs and they have chosen this forum over Scotland to bring their action. So they are more than willing, by bringing the action here, to come here, so they cannot complain. And in fact, it is not true that it would be inconvenient for the plaintiffs who are the only witnesses on damages to come to Pennsylvania. It is simply not the facts. They are willing to come here because they have

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brought the action here or had it transferred here without objection.

So you have the primary witnesses on liability. And you have the primary witnesses on damages. Where are they? They are in Pennsylvania or more than willing to come to Pennsylvania.

Let's backtrack a little bit and take a look at the thrust of what the plaintiffs are contending here. The plaintiffs are contending that there was a defect existing in this aircraft. The case has not proceeded far enough to determine the exact nature, extent or all the elements of the defects that we contend caused this crash. But the point is that where was the defect designed? Where was the defect installed? Where did all the elements constituting the factor that caused the damages in this case take place? Right here in Pennsylvania or in Ohio.

So as you can see, the balance on witnesses, at least the first element if at anything is even, I submit that it is clearly in favor of the plaintiffs, but at least it's even. It is not strongly in favor of the defendants, which is the burden they have to hold to transfer this case to Scotland.

Next, they make a big point that it is inconvenient for this action to be tried here because foreign law will have to be applied and that is the law of Scotland. The

law of Scotland does not govern any issue in this case. Whether you take the conflicts law of California which we submit clearly

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must apply under Van Dusen versus Barrack or even concede, let's take the law of Pennsylvania or let's take the law of Ohio. The conflicts law that is going to apply is basically governmental interests. It may have significant contacts but as the court in Pennsylvania in Griffin versus United Airlines says even under significant contacts we still must look to government interests.

So what states are interested in applying their law to that action? If you read the brief that we filed and the analysis under governmental interests, Scotland has no interest in applying its law. Number one, its damage provisions under its law are limited. Well, would it have an interest in applying its limited damages provision to its own citizens? No.

Scotland obviously wants its citizens to obtain the greatest recovery possible. How will that happen? Through the law of Pennsylvania as opposed to that of Scotland. Now we look at the other side. We have covered damages. What about liability? What is the law of liability in Scotland as it applies to product liability? There's none.

As the defendants have already said—and I concede —the only law involving products cases in Scotland is negligence. There is no strict product liability. So the interest in a state in enacting strict product liability is to protect its own industries—or excuse me—the interest in a state not in

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enacting strict product liability laws is to protect its industries from this rather onerous burden. But are the

industries which we allege caused this crash in Scotland? No, they are not. They are here in Pennsylvania and Ohio.

So does Scotland have any interest in applying either its law of damages or its law of liability? It does not.

Let me go on because I think this will link in a second point. Both counsel have commented that this jurisdiction has no interest whatsoever in this action. That's really absurd as far as I understand it any way. Where was the defect created in this aircraft? It was created right here in Pennsylvania. The defect in design and manufacture of this aircraft as alleged by plaintiffs was created right here. It happened right here. True, the propeller was manufactured in Ohio but it came to Pennsylvania and was put in the aircraft in Pennsylvania.

So as opposed to Scottish law, Pennsylvania law, the defect occurred here and so therefore this community has a very strong interest in preventing such defects from occurring in its industries which manufacture these products.

A final point on that issue, this community has no interest. I submit this community as a whole, Pennsylvania, has a strong interest aside from making its manufacturers not produce defective products. And that is let's say we are successful in this lawsuit, what is going to happen? Industries in Ohio and Pennsylvania hopefully are going to be assessed a rather

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damage award. But let's say we are unsuccessful, the same thing. Industries in Pennsylvania and Ohio are not going to be assessed a very large damage award. The arguments for these people who live in these communities right near these manufacturing plants is obvious. If their manufacturing plants are continually hit with large damage awards, they may go out of business. If they are not

hit with large damage awards, their jobs will remain secure. That is just a digression to show that the community as a whole that we are presented with here in and around this Court is definitely interested in this litigation.

But the defendants have also hit strongly on the point that they cannot join parties that will be necessary to this action in Pennsylvania. And they say the harm that will result from this action is that they will be forced to bring a second action in Scotland for indemnity.

Again, we are looking at the balance here. First off, what if this action is tried in Scotland, what are the plaintiffs going to have to do if they win? They are going to have to come back to the courts of the United States and ask those courts to: One, recognize the judgment and then get a judgment on that judgment in a federal court that can be enforced.

So what are we going to do if it is kicked back and forth for the third and fourth times from Scotland. The point is that we are going to have to bring a lawsuit. So the equities

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on that point again are even, they are not strongly in favor of the defendants. Just as I said before, the interests in this community in hearing this lawsuit are not strongly in favor of the defendants.

Secondly, I would like to just read a portion of the investigative report that was referred to by counsel for the defendant.

MR. SCOTT: Your Honor, if I might object, there is no final investigative report. There is only a provisional report that is under review at this point. Many of the conclusions that were reached by the investigators verge on the inane. And only a few facts which were clear in

their investigation were cited by me. The conclusions I believe should not be brought out at this point.

THE COURT: You may go ahead.

MR. MOORHEAD: It is understandable why counsel for the defendant would say this in light of this conclusion that I am going to read to you from the accident investigation report conducted by the British authorities. At this time I cannot see any technical evidence likely to be sufficient to sustain a damages claim against the owners or operators of the aircraft or their staff.

Now, in their papers and in their oral argument, the defendants say we must bring in these owners, we must bring in the maintainers, we must bring in their staff and we must bring

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in the investigators, we want to bring them into this lawsuit. The point is, I doubt very much if they are going to really want to bring them in because of this opinion.

Let me read on to just another portion of their conclusion: There is, however, one aspect of this tragic happening that I feel warrants detailed scrutiny is the apparent major discrepancy between the single engine performance of this type of aircraft and its stalling characteristics in various configurations either stated or implied in the then current flight manual. This manual having the approval of both the United States of America, federal aviation authorities of its country of origin and the British government civil aviation authority acceptance and approval for mandatory use within the British registered aircraft.

He goes on to criticize that particular point in this aircraft. What I am saying, your Honor, is that all of these witnesses they contend should be called here and

create the inconvenience, I believe in reality will never be called here to trial. Possibly to depositions which can be as easily taken over there as here.

The defendants also bring in the point under Gulf Oil —they didn't in oral argument but they did in writing so I will address it—the site of the crash is important here. I'm sure counsel for defense and your Honor has heard many more aviation cases than I have tried. But I don't believe that the

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view of the premises is at all relevant here. We have alleged a defect in the aircraft, the terrain, the amount of ground cover or whatever that existed at the time of this crash is irrelevant to the issues presented in this case.

So your Honor, I will come back in closing now to what I believe are numerous red herrings that have been thrown into this case. As the defendants recognized in their original motion to transfer this case at their own choosing from California to this Court, this is a products liability action which alleges defects in design and manufacture of an aircraft which was built here and in Ohio.

The nature of the case is concerned solely with the existence of these defects. And under product liability law did these defects exist at the time of manufacture and did these defects proximately cause the crash. The overwhelming number of witnesses to establish a defect exist in Pennsylvania and Ohio. They do not exist in Scotland.

The overwhelming and as a matter of fact all of the witnesses as to damages are willing to come to Pennsylvania. So as to witnesses, they have not handled their burden of making it strongly in favor of a transfer to Scotland.

As to a view of the scene, they have not substantiated their burden. As to a joinder of parties, they have not

substantiated their burden. As to foreign law being applied, it is clear that either the law of California choice of law rules

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apply or Pennsylvania or Ohio. And under all those choice of law rules, Pennsylvania law is going to apply on the basis of governmental interest.

This case definitely has a direct relationship to this community and should be tried here because the manufacturers are either here or in very close proximity.

Finally, your Honor, I cannot minimize the point—and I hope you pay particular attention to this statement that I have I think in our papers made by both the defendant Hartzell and Piper saying that fine, Pennsylvania is fine with us. For the convenience of witnesses it's better here, for the ends of justice it's better here. And then we get it moved here and what happens? No, the convenience of witnesses, it's better in Scotland. The ends of justice is better in Scotland.

I submit, your Honor, that they should at least be estopped to have this case tried in a forum that they themselves chose. And in conclusion, your Honor, I submit that all of the factual, legal and practical requirements for a just and valid cause of action can be maintained in Pennsylvania and through these moving papers have been shown to be able to be maintained in Pennsylvania.

Furthermore and most importantly, the defendants have simply not substantiated their burden to transfer this case to a foreign jurisdiction in Scotland. They make the contention that Pennsylvania was not your original chosen forum and therefore

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you cannot rely on all the cases that say that extreme emphasis should be applied to a plaintiff's chosen forum. I

submit, your Honor, that the United States of America was the plaintiffs' chosen forum and wherever, even the jurisdiction that they themselves chose, we much prefer this jurisdiction over Scotland.

Thank you very much.

MR. SCOTT: Your Honor, I would like to reintroduce myself. I'm Ronald Scott, I represent Hartzell Propeller, Inc. I am not "they". And this "they" did not choose Pennsylvania. This "they" had an alternative motion to get out of California, if somehow we should be found there. That motion wasn't reached. It never took effect because we were found not to be there. And that's very important.

We didn't choose Pennsylvania. We are not here because we selected Pennsylvania as a forum. We didn't. We weren't even there. We can't be estopped. Your Honor recognizes that argument.

The majority of the witnesses. If I were willing to be limited in trial of this case to the witnesses chosen by the plaintiff which plaintiff wished to bring to the United States, plaintiffs' statements would be absolutely correct and I would agree with that. But I'm not. I think I'm entitled to present witnesses other than those that plaintiff chooses for me on issues of damages.

And where am I going to get them and how am I going to

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get them over here and how am I going to compel their testimony? How am I going to get the employers of the plaintiffs' decedents to testify against the widow or the orphan or whatever. How am I going to compel them to cross the ocean to tell a different story than plaintiff wants heard? How can I do that? I can't.

How can I compel the testimony of the mechanic, whereever he is, bless his heart, who loosened up those four nuts and caused this accident. How can I do that? Simply because the British Department of Trade was so slipshod in its investigation as to not go to the accident source, the airport from which the aircraft took off and interview the people who did the work, doesn't mean that we should be forbidden to do so or forbidden to join them as parties if after a proper investigation we can find who they are.

They are the most obvious defendants. The coincidence of having all four mounting nuts come loose simultaneously in the same amount, it was better than 200 hours after the log book—the last log book entry of work on that propeller. The coincidence of those four coming loose simultaneously is incredible. A computer would blow a fuse trying to compute it. The only conceivable way that could have happened was through a mechanic's error.

The plaintiff says he's going to have to bring a lawsuit in the United States if he wins in Scotland. Not if he wins against the proper defendant. The proper defendant is

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already over there. And if we appear and if we are found guilty over in Scotland of having been negligent, if we are responsible, I can't see any difference between transferring a judgment from there to here than transferring a judgment from Pennsylvania to Ohio. Still it's going to be transferred if he's going to have to enforce it against the corporation directly.

He has tried too many cases to know that to be so and your Honor has too.

Scotland he says has no interest—I'll paraphrase him —in even handed justice for its citizens. And I think

that's crazy. Scotland has a great deal of interest as does Pennsylvania in seeing that all of its citizens get the same justice, that no one is preferred because of a fluke. And a fluke is what it would be if this were brought in the United States with everything having happened over in Scotland. Witnesses on liability. I found the argument incredible.

Of course, no matter where the action is brought, depositions in Piqua, Ohio, and in Lock Haven, Pennsylvania, will be taken. That's the mill running in the product liability litigation. But that's by no means all. He makes the assumption that the cause of this accident was the cause that the investigators with the assistance of someone over there on behalf of the plaintiff came up with is in fact the cause. It isn't.

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The cause is quite different. I myself ran a flight test on a similar aircraft. I don't represent Piper. At some time later on I might be punching it out on the other side from Piper. But I ran a flight test on PA 23 250 and I certainly didn't find the results that the Board of Trade investigators found. I found it to fly up to its specifications. I think quite the opposite, everything points to this case being out of Pennsylvania, out of the United States, in Scotland. That's the only place where the plaintiffs could get the even handed treatment that they are entitled to as Scottish citizens rather than preferential treatment that plaintiffs' attorneys would be trying to get.

Thank you.

THE COURT: Thank you. I will take it under advisement. Adjourn Court.

(Whereupon the hearing was concluded.)

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AFFIDAVIT OF DANIEL C. CATHCART IN OPPOSITION TO THE SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FILED BY HARTZELL PROPELLER, INC.

Filed December 4, 1978

[caption omitted in printing]

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

DANIEL C. CATHCART, being first duly sworn, deposes and says:

I am a member of the firm of Magana, Cathcart & McCarthy which firm represents the plaintiff in the above entitled action. This Affidavit is filed in opposition to the defendant HARTZELL PROPELLER, INC.'s Supplemental Brief in Support of Motion to Dismiss. Said brief, as filed and served upon Affiant, contains as Exhibit "A" a copy of a Summons and Complaint arising out of the accident which is the subject matter of this litigation, said Summons and Complaint having been filed in the courts of Scotland. Defendant HARTZELL has urged this Court to construe the attached pleading as evidence that the within action should not be maintained within the United States. Such a construction is unfounded and not inconsistent with the position taken by plaintiff in this action. Suit was filed in Scotland against the owners, operators and maintainers of the Piper aircraft involved in the accident. It was necessary as lawyers to file such an action before the statute of limitations would run in Scotland since this Honorable Court has not yet determined whether or not the real parties in interest may maintain this action in the courts of the United States. It will be noted that the suit in Scotland was brought on the eve of the second anniversary of the accident. It is believed by your Affiant that the statute

of limitations in such actions in Scotland is two years. The parties have no desire to pursue the within action in Scotland and merely had it filed because of the pending running of the statute of limitations and the question of jurisdiction and/or forum non conveniens remaining unresolved here in the United States.

The investigation conducted by representatives of the plaintiff fails to disclose that the operators or maintainers were necessary or desirable parties defendant. To the contrary, the theory of liability as against the defendants before this Court are predicated on the usual products liability theories and are unrelated to any maintenance items. We are dealing with defects claimed to have existed at the time of manufacture related to the design and construction of the propeller assembly, including propeller governor and the single engine handling qualities and characteristics of the Piper aircraft involved. The design, construction and certification of the subject aircraft took place within the jurisdiction of this Court. A more convenient forum for the prosecution of such an action does not exist. To the extent that there is any negligent maintenance or intervening cause, the defendant can certainly obtain this information by way of discovery in England and Scotland. It is clear, however, under the principles of joint and several liability, that any negligence in the maintenance or operation of the aircraft does not diminish the defendant's liability as manufacturers.

WHEREFORE, your Affiant respectfully prays for an Order denying the defendant's motion to dismiss.

Respectfully submitted,

/s/ DANIEL C. CATHCART
Daniel C. Cathcart

[jurat omitted in printing]
[certificate of service omitted in printing]

EXHIBIT "A" TO SUPPLEMENTAL MEMORANDUM OF HARTZELL PROPELLER, INC. IN SUPPORT OF MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS

Filed February 5, 1979
[caption omitted in printing]

Exhibit "A"

OPINION FOR HARTZELL PROPELLERS INC.

Article 4 of the Carriage by Air (Application of Provisions) Order 1967 provides that Schedule 1 of the Order shall have effect in respect of carriage which is not international carriage as defined in Schedule 2. In my opinion the flight which was investigated at the recent Review Board hearing was one to which Article 4 of the 1967 Order applied.

Article 6 of the 1967 Order provides that, among other sections, Section 5 of the Carriage by Air Act, 1961 shall apply to carriage to which the Order applies. Section 5(1) of the 1961 Act is in the following terms: "No action against a carrier's servant or agent which arises out of damage to which the Convention relates shall, if he was acting within the scope of his employment be brought after more than two years, reckoned . . . from the date on which the Aircraft ought to have arrived. . . ."

Article 29(1) of the 1967 Order is in the following terms: "The right to damages shall be extinguished if an action is not brought within two years, reckoned from . . . the date on which the Aircraft ought to have arrived."

I am not concerned about the incorporation of Section 5(1) of the 1961 Act into the 1967 Order. An action

was raised within two years against the pilot's representatives in Scotland. If it had not been, I consider that it would have been open to the pilot's representatives to waive the application of Section 5(1) on the ground that it purports to extinguish the remedy rather than the right.

Article 29(1) of the 1967 Order is in a different position. Had an action not been raised within two years against the carriers I am of opinion that any right to recover damages from them would have been extinguished. Also there could have been no question of waiving the provisions of Article 29(1). I refer Shawcross and Beaumont, Air Law, 4th ed'n, at para. 443 Note 9.

In my opinion the provisions referred to have no bearing on Hartzell's position. Hartzell were not the carriers. Hartzell are sued in the Court of the Middle District of Pennsylvania on the ground that a defect in the propeller caused or contributed to the accident. Had Hartzell been a Scottish Company, and had no cause for the accident been put forward other than a defect in their product, I consider that the normal three year time bar for fatal accident cases would have applied. I refer to Section 17 of the Prescription and Limitation of Actions (Scotland) Act 1973. Hartzell are minded to apply to the Court in Pennsylvania to stay or dismiss the proceedings there in return for an undertaking to submit to the jurisdiction of the Scottish Courts. Assuming that a fresh action is raised in Scotland against Hartzell prior to the third anniversary of the accident, I see no reason why that action should be held to be time barred. Similarly I see no time bar objection arising if, instead of a fresh action being raised, Hartzell are merely added as defenders to the action that was raised in Scotland by the dependents of the deceased passengers prior to the expiry of the two year period. I base my opinion upon the proposition that the 1961 Act and 1967 Order apply to actions brought

against carriers by air and their agents or servants but not to persons, such as Hartzell, who are sued as delinquents on the ground that they supplied a faulty component.

I should make clear why, if the conclusion stated in the preceding paragraph is wrong, and the 1967 Order applies to, among others, actions raised against component manufacturers, I am of opinion that Article 29(1) cannot be waived. My reason is that the effect of the Article is radical in that it extinguishes the remedy. The Court would in my view be bound to take the point. Also, for completeness, I may say that if contrary to my view, Article 29(1) applied to an action raised against Hartzell it would not be a good answer to say that an action was raised within two years against Hartzell in Pennsylvania. I anticipate that a Scottish Court would interpret the words "if an action is not brought" as referring to an action raised in Scotland. Although I do not agree with this narrow approach to interpretation, I note that in analogous circumstances it was adopted by Roskill J. in *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.* (1965) 1 Q. B. 101 at pp. 123-126.

THE OPINION OF

/s/ C. K. DAVIDSON

EDINBURGH.

12th January, 1979.

STIPULATION

Filed May 14, 1979

[caption omitted in printing]

It is hereby stipulated by and between the undersigned as counsel for all parties to this litigation that discovery may proceed in this action without prejudice to the pending Motions to Dismiss on the grounds of forum non conveniens and with the understanding that all material obtained in discovery may be used in any action instituted or to be instituted in Scotland on the same cause of action as the instant action to the extent permitted by the laws and procedural rules of the Scottish Courts.

/s/ LEE C. SWARTZ
Lee C. Swartz, Esquire,
Attorney for Plaintiff

/s/ DANIEL C. CATHCART
Daniel C. Cathcart,
Esquire,
Attorney for Plaintiff

/s/ CHARLES J. MCKELVEY
Charles J. McKelvey,
Esquire,
Attorney for Defendant,
Piper Aircraft
Corporation

/s/ RONALD C. SCOTT
Ronald C. Scott,
Esquire,
Attorney for Defendant,
Hartzell Propeller, Inc.

Approved May 14th, 1979

/s/ R. DIXON HERMAN

AFFIDAVIT OF RONALD C. SCOTT

Filed September 17, 1979

[Caption omitted in printing]

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

RONALD C. SCOTT, being first duly sworn, deposes and says:

I am attorney for Hartzell Propeller, Inc. in this matter. I have received a copy of the recent Affidavit of Daniel C. Cathcart, Esquire and file this Affidavit in response thereto.

In November and December of 1978, deponent attended and participated in a trial in Edinburgh, Scotland regarding the cause of the accident involved in this litigation. An attorney for the families of the deceased passengers also appeared in that matter. Over the course of the hearing, it came out that the pilot had been flying under conditions conducive to mountain wave formation, in an area susceptible to mountain wave formation and at altitudes in violation of his own employer's regulations. At the same hearing it was determined as a matter of fact that there was insufficient evidence of any defect in the aircraft or its equipment, that the flight was a commercial flight, and that the investigators, in failing to ascribe error on the part of the pilot, were being "too naive." The essence of the findings, by which plaintiffs are collaterally estopped, is that there was no defect on the airplane or its equipment shown to be causally related to this accident.

Counsel for plaintiff argues that this action is a products liability action. It is not. It is a lawsuit allegedly to recover damages for the estates and survivors

of decedents. The plaintiff's present theory, which defendant contends is barred by the findings in Scotland, is that there was some product connection with the accident. A different theory is asserted in the actions in Scotland which do not name these defendants and name only the owner, operator and pilot of the aircraft.

Counsel for plaintiff says "always in the past, U. S. aircraft manufacturers have been amenable to suit for personal injuries and wrongful death in the Federal Courts of the United States, including actions brought in this country by aliens." Without citations, Mr. Cathcart refers to various actions and insists that there is no precedent for our proposition in the Motion to Dismiss. In so doing, he ignores not only all of the cases cited in Hartzell's Brief and Supplemental Brief, but also the two most recent decisions on the issue, one of which is from Mr. Cathcart's home jurisdiction, California. The California decision, *Hemmelgarn v. The Boeing Company, et al*, 15 Aviation Law Reporter 17,575 is attached hereto for the Court's assistance. The most recent case does not appear to have been printed in official publications yet; but attached is a summary of the case from Product Liability Reporter. When the case is reported, deponent will supplement this memorandum with an official citation.

Defendant Hartzell does, however, join counsel for plaintiff in urging a prompt dismissal of the action in order that it can be reinstituted and processed in Scotland while witnesses and evidence are still available.

/s/ RONALD C. SCOTT
Ronald C. Scott

[juriat omitted in printing]
[certificate of service omitted in printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES McDOUGALL STORM, DAVID VINCENT MORAN and PETER CUNNINGHAM SCOTT,

Plaintiffs

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE DIVISION, a Division of Avco Corporation; HARTZELL PROPELLER, INC., a corporation,

Defendants

MEMORANDUM

This action arises out of an airplane crash near Tulla, Scotland on July 27, 1976 in which all persons aboard were killed. The Plaintiff, Gaynell Reyno, instituted this suit as the personal representative of five decedents, William Fehilly, Liam Stuart Fehilly, William James McDougal Strom, David Vincent Moran, and Peter Cunningham Scott. Gaynell Reyno seeks general damages for the heirs and next of kin of the above decedents and damages for funeral and burial expenses in this suit styled as one for wrongful death on the basis of products liability and negligence theories. The remaining Defendants, Piper Aircraft

Company and Hartzell Propeller, Inc., were the manufacturers of the aircraft and propeller respectively. A number of motions are presently before the court, a motion to dismiss filed by Defendant Hartzell Propeller, a motion for judgment on the pleadings or for summary judgment filed by Piper Aircraft, and two motions to strike a responsive brief filed by the Plaintiff. After reviewing the extensive materials submitted by all parties, we have concluded that this action must be dismissed on the ground of *forum non conveniens.* This dismissal will be conditioned on the Defendants abiding by their stipulation to submit to the jurisdiction of the courts of Scotland and their waiver of the Scottish statute of limitations.

Several issues were raised by the motions of the Defendants. Other than their main argument that the action should be dismissed under the doctrine of *forum non conveniens,* the Defendants also asserted that under applicable choice of laws rules that the law of Scotland would control this action and that pursuant to Scottish law, the Plaintiff neither has standing nor a right to proceed under the theory of strict tort liability. This question of the applicable law is interrelated with the analysis for *forum non conveniens* and because of our decision that the Defendants have shown overwhelming reasons for dismissal under this doctrine, we need not directly confront the standing and liability issues. The Plaintiff has also raised the question of estoppel which we have found to be unpersuasive.

Our primary attention therefore is focused on the factors applicable to the doctrine of *forum non conveniens* and the question whether we should exercise jurisdiction over this action brought by reason of an aircraft accident in Scotland, in which Scottish citizens who were passengers and a Scottish pilot, acting in the course of his employment with a Scottish Air Service, were killed while flying in Scottish airspace and when all decedents' survivors, the

real parties in interest, are citizens and residents of Scotland and more particularly, when the only contact with Pennsylvania is that it was the site of the manufacture of the airplane involved in this litigation, not the propeller which was manufactured and designed in Ohio, over seven years prior to the date of the fatal accident. Too much has happened from the date the airplane left the plant of Piper Aircraft, which goes to the heart of the question of liability, that the contact with this forum with respect to this action can at best be described as plainly insignificant.

The procedural history of this case is important to our decision of dismissal. The action was instituted by Plaintiff Reyno in the Superior Court of the state of California for the county of Los Angeles in July of 1977. After being removed to federal court in August of that year, Defendant Hartzell filed a motion to dismiss the action for lack of personal jurisdiction or in the alternative to transfer the action pursuant to 28 U. S. C. § 1404(a). Defendant Piper then joined in Defendants Hartzell's motion to transfer the action on November 23, 1977. The District Court entered an order on December 21, 1977 granting Defendant Hartzell's motion to quash service of process and granting the motion to transfer this action to the United States District Court for the Middle District of Pennsylvania. The quashing of service of process to Hartzell was based on due process considerations set forth in *International Shoe Company v. Washington*, 326 U. S. 310 (1945). The court did not dismiss the action against Defendant Hartzell since valid service against it was possible in the Middle District of Pennsylvania. The importance of the transfer of the action and the quashing of service against Hartzell lies in the applicable choice of laws rule that is relevant to each Defendant under rules of *Van Dusen v. Barrack*, 376 U. S. 612 (1964) and *Klaxon Co. v. Stenor Electric Manufacturing*, 313 U. S. 481 (1944).

The facts as noted center on the crash of an aircraft on July 27, 1976 in which the pilot and all passengers were killed in the navigable air space near Tulla, Scotland. The aircraft involved in the accident was a Piper Model TA-23 bearing British registration mark G-AYSF which was manufactured by Defendant Piper at Lock Haven, Pennsylvania. The plane's propeller was designed and manufactured by Defendant Hartzell Propeller, Inc. in Ohio. The aircraft was being piloted at the time of the accident by a Scottish citizen and resident, over mountainous terrain in southern Scotland. Subsequent to the manufacture of the aircraft involved in this accident it was sold and delivered to a purchaser in Ohio for use in the United States. By a chain of events, apparently still unknown to the Defendants, the plane came to be owned and operated by a Scottish air-taxy company in Scotland and the British Isles. The plane was owned, operated, maintained, and serviced by the Scottish owner for several years preceding the accident of July 27, 1976. The British Department of Trade Investigation investigated the accident shortly after its occurrence. Presently, what remains of the wreckage is in the possession of the British Department of Trade Investigation.

The Plaintiff, Gaynell Reyno instituted this action as the personal representative of the estates of five of the decedents. All of these decedents were citizens and residents of the country of Scotland. Also, all heirs and next of kin, and all those persons entitled to recover by virtue of the deaths of the passengers, (if any recovery is decreed), are citizens and residents of the country of Scotland. Plaintiff Reyno is a citizen and resident of California and is not related to the decedents.

The Defendants assert that the accident was due to pilot error or improper maintenance and servicing of the aircraft and in this respect have stated their desire and

inability to join the operating company by whom the pilot was employed, the pilot's estate, and the owner and maintainer of the aircraft. A lawsuit has been brought before the courts of Scotland naming as defendants the operating company, McDonald Aviation, Ltd., the owner of the plane, Air Navigation and Trading Company, Ltd., the executor of the pilot's estate, and the Civil Aviation Authority. Also an action was commenced in the courts of Great Britain against Piper Aircraft and Hartzell Propellers along with MacDonald Aviation and Air Navigation and Trading Company by a personal representative of the sixth passenger in the aircraft at the time of the accident, the only passenger not represented by Gaynell Reyno in the instant action. Therefore at least one action is pending before the courts in the United Kingdom against the present Defendants and other involved parties.

We now begin with a discussion of the factors that we believe substantially point to the dismissal of this action under the doctrine of *forum non conveniens.* We have the inherent power to refuse jurisdiction over a case such as this one where the interests of justice require that the suit be brought in a foreign country. *Gulf Oil Corporation v. Gilbert,* 330 U. S. 501 (1947); *DeMateos v. Texaco, Inc.,* 562 F. 2d 895 (3d Cir. 1977), *cert. denied,* 435 U. S. 904 (1978); *Fitzgerald v. Texaco, Inc.,* 521 F. 2d 448 (2d Cir. 1975) *cert. denied,* 423 U. S. 1052 (1976); *Dahl v. United Technologies Corporation,* 472 F. Supp. 696 (D. Del. 1979).

The general factors that we must consider in determining whether to dismiss an action for *forum non conveniens* were set forth by the Supreme Court in *Gulf Oil Corporation v. Gilbert,* 330 U. S. 501 (1947). Mr. Justice Jackson enumerated in that decision numerous private and public interests that should be considered under the doctrine. The factors pertaining to the private interests of

the litigants are the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive" *Id.* at 508. The public factors bearing on the question include the administrative difficulties flowing from court congestion, an interest in having local controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the Court, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509.

The above cited factors have generally been followed by all courts presented with the issue of whether a case should be dismissed because a foreigner forum is the more convenient one. *See, e.g., DeMateos v. Texaco, Inc.*, 562 F. 2d 895, 899 (3d Cir. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 450-51 (2d Cir. 1975); *J. F. Pritchard and Co. v. Dow Chemical of Canada*, 462 F. 2d 998, 1000 (8th Cir. 1972); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499, 501-02 (2d Cir. 1966); *Dahl v. United Technologies Corporation*, 472 F. Supp. 696, 699 (D. Del. 1979); *Top Form Mills v. Sociedad Nationale Industria*, 428 F. Supp. 1237, 1252-53 (S. D. N. Y. 1977); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 26-27 (N. D. Ohio 1977); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S. A.*, 437 F. Supp. 331, 332 (S. D. N. Y.); *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 923 (S. D. N. Y. 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 814-13 (S. D. N. Y. 1972); *McCarthy v. Canadian National Railways*, 322 F. Supp.

1197, 1199 (D. Mass. 1971); *Olympic Corporation v. Societe Generale*, 333 F. Supp. 121, 123-24 (S. D. N. Y. 1971). We have carefully read each of the above cited decisions and in light of these decisions and their analysis of the Gulf Oil factors, it is clear that it would be no less than an abuse of our discretion if we did not dismiss this action on *forum non conveniens* grounds as the Gulf Oil criteria overwhelmingly point to dismissal.

The first factor that we must consider is whether an alternative forum is open to the Plaintiff if this motion is dismissed. Generally, it has been stated by the courts that the doctrine of *forum non conveniens* presupposes that an alternative more appropriate and convenient forum is available. *See, e.g., DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1006 (D. S. C. 1978), *Texaco Trinidad v. Astro Exito Navegacion S. A.*, 439 F. Supp. 331, 332 (S. D. N. Y. 1977); *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 915 (S. D. N. Y. 1977). This principle is taken from the Gulf Oil decision in which it is stated "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process. . . ." *Gulf Oil* at 506-07. In the instant motion the Defendants have consented to submit to the jurisdiction of the Scottish courts of law and we have noted our intention of conditioning the dismissal of this action on their submission to the jurisdiction of such courts and their waiver of any statute of limitation. Plaintiff has an alternative forum available to her and in fact a case is proceeding in the foreign courts already.

Next, we turn to the important factor of Plaintiff's choice of forum. As stated in *Gulf Oil*, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" *Id.* at 508. Here the Plaintiff's first choice was the California state

Superior Court. Plaintiff relies on a number of cases under 28 U. S. C. § 1404(a) in which the Plaintiffs were American citizens. This case, however, does not involve section 1404(a) as the determination rests on our inherent power to dismiss and it also does not involve Americans as real parties in interest. Rather, the Plaintiff is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law.

Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States. As stated in *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 927 (S. D. N. Y. 1977), when a case involves a "claim of a foreign plaintiff, [his] choice of forum should be given less weight than the choice of an American plaintiff. . . ." And in *Olympic Corporation v. Societe Generale*, 462 F. 2d 376, 378 (2d Cir. 1972), the court stressed that the balance of the Gulf Oil factors need not be as strong in favor of defendants when the plaintiff is not an American citizen. *See also, Olympic Corporation v. Societe Generale*, 333 F. Supp. 121, 124 (S. D. N. Y. 1971); *Michell v. General Motors Corporation*, 439 F. Supp. 24 (N. D. Ohio 1977).

Also, the plaintiff's choice of forum is generally given less weight when the forum selected is not the plaintiff's home jurisdiction. *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 451 (2d Cir. 1975); *McCarthy v. Canadian National Railways*, 322 F. Supp. 1197, 1199 (D. Mass. 1971). In this case the real parties in interest, the heirs and next of kin of William Fehilly, Liam Stuart Fehilly, William James McDougall Strom, David Vincent Moran, and Peter Scott, are not American citizens or residents, but rather,

citizens and residents of Scotland. Since the real parties in interest are not American citizens, and the forum of either California or the Middle District are not in anyway their "home" forum, this factor of plaintiff's choice of forum is entitled to little weight.

The next grouping of factors that we will weigh are the private interests of the litigants, including relative ease of access to sources of proof, availability of compulsory process, cost of obtaining willing witnesses, necessity of a view of the premises, and the site of the investigation of an accident. A review of the facts in this case illustrates that all such private interests point to Scotland as the appropriate forum for this litigation.

Nearly all events relevant to this action occurred outside of the Middle District of Pennsylvania. The only connection with this forum is the fact that the plane was manufactured here over seven years before the accident. The only contact with Plaintiff's choice of forum, California, is that Plaintiff's attorney and expert reside there. Convenience to counsel or to expert witnesses, it should be noted, is of small importance in the balancing of factors. See *Car-Freshner Corporation v. Auto Aid Manufacturing Corporation*, 438 F. Supp. 82, 85 (N. D. N. Y. 1977). The connections with Scotland are overwhelming. The accident occurred in Scotland, the real parties in interest are citizens of Scotland, the decedents were all citizens of Scotland, the investigation of the accident occurred in Scotland, the aircraft was owned, operated, and maintained by a Scottish company, the pilot was Scottish, the wreckage remains in the possession of the foreign authorities, nearly all witnesses needed for the defense of this suit are located in Scotland, and all witnesses to damages are located in Scotland.

The ease of access to proof element strongly points to dismissal of this action. First, all evidence as to damages,

both witnesses and documents, is located in Scotland. Ease of access to sources of proof of damages is an important factor in a wrongful death action. *Domingo v. States Marine Lines,* 340 F. Supp. 811, 815 (S. D. N. Y. 1972). Furthermore, nearly all witnesses necessary for the defense of this suit are located in the British Isles. For example, witnesses regarding the maintenance of the aircraft are in Great Britain, witnesses concerning the training of the pilot are located there, and witnesses relating to the investigation of the accident are in the British Isles. None of these witnesses are subject to compulsory process. Clearly, these witnesses are critical to this case and since they are located in Scotland, it would be more convenient for the witnesses and less costly for the litigants to litigate this matter in Scotland. *See, Fitzgerald v. Texaco, Inc.,* 521 F. 2d 448, 451 (2d Cir. 1975); *Dahl v. United Technologies Corporation,* 472 F. Supp. 696 (D. Del. 1979); *Domingo v. States Marine Lines,* 34 F. Supp. 811, 815 (S. D. N. Y. 1972); *Top Form Mills v. Sociedad Nationale Industria,* 428 F. Supp. 1237, 1253 (S. D. N. Y. 1977); *J. F. Pritchard & Co. v. Dow Chemical of Canada,* 462 F. 2d 998, 1002 (8th Cir. 1972); *DelRio v. Ballenger Corporation,* 391 F. Supp. 1002, 1004 (D. S. C. 1975).

Plaintiff relies on the argument that the essential elements needed for proof of her case are present in this forum since the plane was designed and manufactured here. We note that the alleged defective component part, the propeller, was designed and manufactured outside of this forum. Also the aircraft was manufactured over seven years prior to the accident and evidence of any changes in the plane located in Scotland. Even Plaintiff admits that all witnesses to damages reside in Scotland. Furthermore, we cannot accept Plaintiff's argument that the evidence going to legitimately raised defenses is irrelevant to our determination. The interests of justice require that a trial be fair to all parties, not just the Plaintiff.

While there are no doubt numerous cases that have reached this same conclusion based on fundamental fairness, we will specifically point to just two. The first case we rely on is *Michell v. General Motors Corporation*, 439 F. Supp. 24 (N. D. Ohio 1977). In *Michell* the court held that mere design and manufacture of an infant seat in Michigan was not crucial in the balancing of factors and it dismissed the suit on *forum non conveniens* grounds where the injury was to Canadian plaintiffs, involved a Canadian accident, when presentation of Canadian witnesses was necessary and could not be guaranteed in the United States. *Id.* at 25-26. All of these factors are present in the instant case and like the *Michell* court, we find the evidence relating to design in this action to be overwhelmed by the evidence needed from Scottish sources.

The second case on point on this question is *Dahl v. United Technologies Corporation*, 472 F. Supp. 696 (D. Del. 1979). *Dahl* was brought in Delaware by the personal representative of four Norwegians who died in a crash of a Norwegian owned and operated helicopter in Norwegian territorial waters against the helicopter manufacturer on the basis of design and manufacture defects. Chief Judge Latchum discussed the nearly identical factual pattern as we have here in the following manner:

> . . . a substantial amount of the testimonial evidence will come from Norwegians. Testimony from persons who knew the decedents will be relevant to the damages issue. Among the potential liability witnesses are employees of Helikopter Service AIS, employees from other firms in Norway that serviced or made installations on the helicopter, and the Norwegian government officials who investigated the accident.

Id. at 700. We think the chief judge was absolutely correct, that we must look to all evidence that is necessary

for a fair trial and in this case the place to find such evidence is Scotland.

Interrelated with the above discussion is the fact that the witnesses and other evidentiary materials that are located in Scotland are beyond the reach of compulsory process of this court. The unavailability of compulsory process to compel the attendance of witnesses necessary for a complete and fair trial has been recognized as a critical factor in the dismissal of cases for *forum non conveniens*. *See e.g., Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 451 (2d Cir. 1975); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499 (2d Cir. 1966); *Dahl v. United Technologies Corporation*, 472 F. Supp. 696, 700 (D. Del. 1979); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S.A.*, 437 F. Supp. 331 (S. D. N. Y. 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 815 (S. D. N. Y. 1972).

Finally, the absence of necessary third parties weighs heavily on our determination that the Middle District is not a suitable forum for this litigation. The Defendants have pursuasively argued that persons located in Scotland ought to be made parties to this suit. These include the pilot, the owner of the plane, and the operating company. Since the Defendants in this action cannot implead these necessary parties it would be unfair to make Piper and Hartzel proceed to trial in this forum. This inability to implead parties located in foreign countries has likewise been viewed as a critical factor by the courts. *See e.g., Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 511 (1946); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S.A.*, 437 F. Supp. 331, 334 (S. D. N. Y. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 453 (2d Cir. 1975); *Fitz-*

gerald v. Westland Marine Corporation, 369 F. 2d 499, 502 (2d Cir. 1966); *Olympic Corporation v. Societe Generale*, 333 F. Supp. 121, 124 (S. D. N. Y. 1971); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 816 (S. D. N. Y. 1972). These potential defendants could be reached in Scotland and in fact they have been joined with the instant Defendants in a suit in the British Isles. Certainly it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses.

The last factor that we will discuss pertaining to the private interests is the necessity of a view. More generally, we believe this factor of Gulf Oil requires us to consider, as many courts have done, where the accident or event took place. All facts relevant to the crash are in Scotland, other than the fact that the manufacture and design of the plane occurred in the United States seven years before. If weight should be assigned to this "view" criteria, it certainly favors the Defendants. Familiarity with the topography around Tulla, Scotland and inspection of the wreakage of the plane would be aided by a trial in the British Isles where the accident occurred.

We now will look to the factors concerning the public interest which we believe even more strongly point to dismissal. These factors include court congestion, local interest in the lawsuit, court familiarity with the law that will govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the court and the unfairness of burdening citizens in an unrelated forum with jury duty. *Gulf Oil Co. v. Gilbert*, 330 U. S. 501, 507-09 (1946); *Demateos v. Texaco, Inc.*, 562 F. 2d 895, 899, n. 2 (3d Cir. 1977); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977).

Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly

complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

The law is clear that we must apply the choice of law rule of the state in which we sit, Pennsylvania. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U. S. 487 (1941). However, when a case is transferred pursuant to 28 U. S. C. § 1404(a), we then apply the choice of law rules of the state from which the case was transferred. *Van Dusen v. Barrack*, 376 U. S. 612 (1964). Thus in this case we must apply the California choice of law rules to Defendant Piper. In applying the choice of law rules of California we have three choices of law, California, Pennsylvania, and Scottish. With respect to Defendant Hartzell, the applicable law is not as easily arrived at.

Defendant Hartzell as previously noted, was found to have insufficient contact with the state of California and service was quashed. The District Court of California did not dismiss the action to Defendant Hartzell, but instead properly transferred the action to this forum. We use "properly" in the sense that the court had the power to transfer the action as to Defendant Hartzell even though service was quashed. Plaintiff argues that the Van Dusen rule applies to Hartzell as well as Defendant Piper, however, for the reasons that follow, we cannot accept this assertion.

The purpose of the Van Dusen rule was to prevent a party from obtaining a change in the law that would be applied to a case by seeking a transfer of the action. In essence, the Van Dusen Court ruled that a transfer under section 1404 should result in a change of courtrooms only, not a change in the applicable law. In the instant case the district court of California held that the law of Cali-

fornia could not apply to Defendant Hartzell because of insufficient contacts with that state. The question we are presented with is whether the Plaintiff in this action can capture the law of California under Van Dusen for transportation to this district and have it apply to Defendant Hartzell when service against Defendant Hartzell was improper in California. We hold that Plaintiff cannot accomplish this. Simply, the Plaintiff cannot take advantage of the law of California when she could not properly obtain jurisdiction over Defendant Hartzell there. Thus, to Hartzell we must apply Pennsylvania choice of law rules.

First, we will briefly discuss whether California choice of law rules requires that we apply California, Pennsylvania, or Scottish law to Defendant Piper. California courts follow the governmental interest approach in resolving conflict of law issues. *Reich v. Purcell*, 67 Cal. 2d 551, 432 P. 2d 727 (1967); *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P. 2d 666 (1974). As Plaintiff states in her brief the "governmental interest approach differs greatly from the significant contacts approach utilized in Pennsylvania." The governmental interest approach, in determining the law applicable in a California forum, applies to situations involving a foreign country and the choice between the two. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P. 2d 666 (1974). The objective of the analysis is to determine the law that most appropriately applies to the issue involved.

The governmental interest approach involves three steps of analysis. First, the applicable legal issue and law must be identified. Second, the state interest underlying the law must be determined. Third, it must then be determined if that interest would be furthered through application of the states' law to resolve the specific issues involved in the case. We intend to make no definitive ruling on what law will apply under the California gov-

ernmental interest analysis. Rather, our discussion will go only so far as to hold that either Pennsylvania or Scottish law will apply under the California choice of laws rules. We are relegated to this less that complete analysis because of our unfamiliarity with Scottish law which in itself is a factor supportive of dismissal of the action.

Areas of conflict are present between these three jurisdictions, i.e. Pennsylvania, California, and Scotland. First, Scottish law does not allow a personal representative to bring an action of this kind in Scotland. Under Scottish law, a personal representative may only bring an action for funeral expenses. Otherwise, an action of this type may be brought only by the deceased's relatives or dependents. We have previously stated that Gaynell Reyno meets neither of these requirements. Both Pennsylvania and California appear to permit such suits. Second, the law of Scotland has not adopted and does not recognize the theory of strict products liability. The only basis for liability in Scotland for the manufacturer of a defective product is negligence. In contrast, both Pennsylvania and California recognize strict liability.

What interests of the state these laws promote must be identified by reference to the interpretations of the laws by the respective forum courts. California courts have held that the states interest in creating a cause of action for wrongful death lies in governing the distribution of proceeds to beneficiaries and also the interest of deterring conduct within its borders that takes life. *Hurtado v. Superior Court*, 114 Cal. 3d 574, 522 P. 2d 666 (1974). For the purposes of this discussion we will assume that similar interests are promoted by the Pennsylvania laws. Since the accident did not occur in either Pennsylvania or California and because none of the decedents were residents of either of these states, it would appear that the application of either Pennsylvania or California law would

not further the purpose of the wrongful death laws. If the purpose of the Scottish law, permitting recovery for relatives of decedents, is similar, it would seem that its interests would be furthered by the application of the law of Scotland.

Particularly, this is true with respect to the rule of law in Scotland that only relatives or dependents of a deceased may bring an action of the type of the instant action and not a personal representative unrelated to the decedent. We, however, only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make, as we said before, any definitive ruling on the purpose of the Scottish law or thereby the choice of law. We do agree with the Plaintiff that in line with the California decisions, that the restrictions on recovery that exist in Scotland would generally not be applied in a choice of laws situation as the foreign country would likely have no interest in restricting any recovery its citizens might receive in foreign courts from foreign defendants. See, *Hurtado v. Superior Court*, 114 Cal. 3d 574, 522 P. 2d 666 (1974). We do not believe the provisions restricting suits of this nature to relatives of the decedents fall within this general principle however. Such a restriction would likely be for the purpose of insuring that suits are brought by persons interested in the action so that competence of counsel and administration of a suit are in the hands of those parties with the ultimate interest.

We therefore return to our previously enunciated conclusion that the law of California would not be applied under the choice of law rules of California as that state has no interest in having its laws apply. Plaintiff admits this fact. Furthermore, we believe that Pennsylvania also has no governmental interest in having its wrongful death laws apply. For the protection of the real parties in interest in

this suit we believe that the application of Scottish law would further the purpose of the laws of Scotland with respect to the restrictions on proper plaintiffs. We believe that the California courts would therefore apply the law of Scotland to this suit. Even if we assume that the Plaintiff is correct and that Pennsylvania law would be applied by the California courts to this case, this does not aid the Plaintiffs position.

There exists a conflict among the three forums in the law of products liability. Scotland only recognizes negligence as a basis for liability while the two states apply the rule of strict liability. California has no interests in having its products liability law apply and thus under the California choice of law rules it would not apply its own law. See, *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P. 2d 719 (1976); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P. 2d 727 (1967). Our choice is thus between Scottish law and the law of Pennsylvania.

The law of Scotland in not recognizing strict liability is more limited in terms of liability than Pennsylvania. Generally, such a restriction provides an indication that the law seeks to limit the liability of its resident manufacturers to those cases where negligence can be shown; that only culpable conduct will result in liability. If the only purpose of the requirement of proof of negligence is to aid manufacturers in Scotland, then we may assume that the purpose of the law will not be furthered by applying it to American manufacturers.

Pennsylvania's interests in recognizing strict liability is foremost in ensuring that citizens will be compensated for injuries resulting from defective products. There does exist in the imposition of strict liability on manufacturers an element of deterence. While the element of compensating injured residents outweighs the deterence factor, at least some slight interest on the part of the state of

Pennsylvania would be furthered if the law of Pennsylvania were applied to Defendant Piper. No Pennsylvania governmental interest, however, would be promoted by the application of Pennsylvania law to Defendant Hartzell. Since none of the decedents nor their relatives were Pennsylvania citizens, Pennsylvania's interest in compensating its injured citizens is of little weight. While the interest of Pennsylvania in applying its laws is indeed slight, neither of the other forums has any apparent interest in applying their laws and we therefore assume that California courts would apply Pennsylvania law under the choice of law rules of California.

In summary, under the California choice of law rules, it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation, Plaintiff would not be a proper litigant. Second, the strict liability law of Pennsylvania would likely apply to Defendant Piper and not the negligence law of Scotland.

Next, we will briefly review the law that should apply to Defendant Hartzell under Pennsylvania choice of law rules. As Plaintiff accurately points out in her brief, the courts of Pennsylvania follow the significant contacts approach. In *Griffith v. United Airlines*, 416 Pa. 2d 1, 203 A. 2d 796 (1964), the Supreme Court of Pennsylvania adopted the rule of the Restatement Second of Conflicts of Laws, section 145, which states that in a tort action, the rights and liabilities of the parties are determined by the local law which has the most significant relationship to the occurrence or to the parties. "To determine which law has the most significant relationship, the court is instructed to consider: the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, place of incorporation, or the place of business of the parties; and the place where the relationship

between the parties is centered." *Lewis v. Chemetron Corporation*, 448 F. Supp. 211, 212 (W. D. Pa. 1978); *Zurzola v. General Motors Corporation*, 503 F. 2d 403 (3d Cir. 1974); *Samuelson v. Susen*, 576 F. 2d 546 (3d Cir. 1978). Any analysis of the relevant contracts in the instant suit leads to the inevitable conclusion that the courts of Pennsylvania would apply the law of Scotland to this action.

To reiterate some of the crucial aspects of the contacts, we begin with the fact of the accident in Scotland. The conduct giving rise to the injury occurred in one of three places, Ohio, Pennsylvania, or Scotland. The real parties in interest are domiciled in Scotland, are residents of Scotland, while the Defendants are located in Ohio and Pennsylvania. We will not outline the contact in any more detail as we find the weight of the contacts with Scotland to be overwhelming. We hold that the law of Scotland would apply in the instant action to Defendant Hartzell.

We will now once again turn our attention to the public interest factors of Gulf Oil. As Gulf Oil recognized an extremely important factor in the balance of interests is the fact that foreign law will govern all or part of a case. 330 U. S. at 508; *see also, Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 924 (S. D. N. Y. 1977); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 816 (S. D. N. Y. 1972); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499, 502 (2d Cir. 1966); *McCarthy v. Canadian National Railways*, 322 F. Supp. 1197 (D. Mass. 1971). We have determined that Scottish law will govern part of this case. We, of course, are not familiar with the law of Scotland and would have to rely on experts from that country. *See, Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448

(2d Cir. 1975). Clearly, it would be better for all parties for this case to proceed in a court in Scotland that is at home with the law of that country. This case is further complicated by the fact that different laws would apply to different parties. The result of this would no doubt cause hopeless confusion and would likely lead to inconsistent or an inequitable result if a trial were held here. Dismissal of this action avoids unnecessary problems of conflict of laws and the application of foreign law.

Another factor that Gulf Oil suggests that we consider is the unfairness of burdening citizens in this forum with jury duty when this forum has little connection with the controversy. The only connection with this forum is that the plane was manufactured in this district years before this accident. Trial of this case would take weeks and we do find that it would be an unfair burden to impose this on the citizens in this community. Also, it would be a huge burden on this court in terms of both time and the costs involved. Our court is too congested for us to try an action that belongs in a foreign forum. *See,* Gulf Oil at 508509; *DelRio v. Ballenger Corporation,* 391 F. Supp. 1002, 1005 (D. S. C. 1975); *Michell v. General Motors Corporation,* 439 F. Supp. 24, 28 (N. D. Ohio 1977); *Domingo v. States Marine Lines,* 340 F. Supp. 811, 816 (S. D. N. Y. 1972); *Dahl v. United Technologies Corporation,* 472 F. Supp. 696, 701 (D. Del. 1979).

If we attempted to try this action in this forum the administrative and legal difficulties would be extreme. The legal problems include determining the serious and complex conflict of law questions, which this memorandum has only touched on. Likewise, the large numbers of witnesses that would be needed from Scotland, the British Isles, Ohio, and California would likely cause administrative difficulties. The physical evidence is in Scotland or the British Isles. We also note that Scotland has

a large interest in the outcome of this litigation as it occurred in its airspace. The case thus may shed light on considerations which affect the safety of its citizens. *See, Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448 (2d Cir. 1975)). All of these matters lead us to conclude that the public interest would be better served by a trial in Scotland.

That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum. *See e.g., Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977); *Texaco Trinidad v. Astro Exito Navegacion S.A.*, 437 F. Supp. 331, 333-34 (S. D. N. Y. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 453 (2d Cir. 1975).

The Plaintiff by brief and at oral argument asserted that the Defendants should be estopped from seeking dismissal of this action on *forum non conveniens* grounds. No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. Plaintiff argues that since the case has been transferred once before and for the reasons stated by Defendants in their briefs that they should now be estopped from arguing that the Middle District is not a proper forum. A reading of the briefs filed by Plaintiff in response to the transfer motion, in accordance with this argument, would lead us to conclude that Plaintiff should be estopped

from raising this argument. The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for *forum non conveins* first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.

The action will be dismissed on the conditions that the Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts.

An appropriate order will be entered.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

DATED: October 19, 1979

ORDER

Filed October 19, 1979
[Caption omitted in printing]

ORDER

AND NOW, this 19th day of October, 1979, in accordance with the memorandum this day filed, IT IS ORDERED that this action be and is hereby dismissed on the ground of *forum non conveniens.*

IT IS FURTHER ORDERED that the Defendants shall waive any statute of limitation defense that they may have in the courts of Scotland and that they submit to the jurisdiction of the courts of Scotland as a condition to the above ordered dismissal.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

AFFIDAVIT OF RONALD C. SCOTT AND EXHIBIT "A" THERETO

Filed October 30, 1979

[Caption omitted in printing]

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss:

RONALD C. SCOTT, being first duly sworn deposes and says:

Counsel for plaintiff has filed an Affidavit with this Court bearing the date 8th of October, served upon this defendant by mail on 16th October 1979 which contains statements which, in the view of the affiant require correction upon the record.

The plaintiff's counsel's Affidavit denies that the hearing referred to in affiant's last Affidavit was a trial, which is a statement which would have caused considerable surprise to the many barristers, solicitors and court officers who spent three weeks in an Edinburgh courtroom trying an appeal from the findings of the Department of Trade investigators, of which the plaintiffs were notified and to which they were invited to give evidence and participate. It was a statutory trial under the United Kingdom Civil Procedures Act and, within the meaning of the principles of res adjudicata, an adversary proceeding. An opportunity was provided to the plaintiff to present all evidence against the defendants. No evidence such as is referred to by counsel for the plaintiff as having been discovered by plaintiff's having sent investigators and experts to Europe to examine the wreckage was ever referred to except to the extent that the plaintiff's alleged experts succeeded in beguiling the British Department of Trade investigators into making the proven false findings they did find.

Plaintiff's attorney comments upon the authority cited by your affiant. No comment is required to demonstrate the emptiness of the comments other than a citation in an official reporter of the case earlier cited, *Dahl v. United Technologies Corporation*, which now appears at 472 F. Supp. 696.

Finally, plaintiff's attorney cites and attaches to his opinion the overruled finding of the Department of Trade investigators and omitted to advise the Court that the decision and findings had been found without foundation. Attached hereto and made a part hereof as Exhibit "A" is a true and correct copy of the advance copy of the appellate opinion of Lord Jauncey overruling the findings to which plaintiff's counsel referred.

Very respectfully,

/s/ RONALD C. SCOTT
Ronald C. Scott

[jurat omitted in printing]

Exhibit "A"

Review of the Aircraft Accident Report on the accident to Piper PA E 23 (AZTEC) Series 250 G-AYSF at Moffat, Dumfriesshire on 27 July 1976.

Report before Mr C E Jauncey, QC, now The Hon Lord Jauncey and Captain Duncan McIntosh, OBE AFC Mr John Barker (Technical Assessors).

APPEARANCES

Mr C N McEachran, Advocate and Mr Robert Black	(Instructed by the Crown Agent) appeared as Counsel on behalf of the Review Board.
Mr C K Davidson, QC	(Instructed by Messrs Shepherd & Wedderburn, WS) appeared for Hartzell Propeller Inc.
Mr J A Cameron, Advocate	(Instructed by Messrs W & J Burness, WS) appeared on behalf of Avco-Lycoming Inc.
Mr Harvey Crush	Of Messrs Norton, Rose, Botterall & Roche, Solicitors, London appeared on behalf of the Piper Aircraft Corporation.
Mr I R Hamilton, Advocate	(Instructed by Messrs Boyd Jameson & Young, WS) appeared on behalf of Air Navigation and Trading Company Limited.

Mr A C M Johnston, Advocate	(Instructed by Messrs Bonar, Mackenzie, WS) appeared on behalf of the Civil Aviation Authority.
Mr Scott Baker, QC (of the English Bar)	(Instructed by Messrs Hagart & Burn-Murdoch, WS) appeared on behalf of the Personal representatives of the deceased pilot.
Mr D J D Macfadyen, Advocate	(Instructed by the Solicitors Office, Department of Trade) appeared on behalf of the Accident Investigation Branch of the Department of Trade.

Mr A D McKay of Messrs Patrick & James, WS appeared at the Preliminary Hearing on behalf of McDonald Aviation Limited but did not appear thereafter.

Mr J A D Innes of Messrs Dundas & Wilson, CS appeared on behalf of the representatives of the deceased passengers but asked leave to withdraw at an early stage in the proceedings.

LIST OF DOCUMENTS

Report dated 10 November 1977 on Engineering data prepared by C A Protheroe, Inspector of Accidents.

Report dated 8 November 1976 with addendum dated 1 April 1977 prepared by D W Squire, Chief Engineer, Engine Overhaul Department, CSE (Aircraft Services) Limited.

Report dated 22 December 1976 on tests carried out to determine rate of oil leak from propeller governor prepared by Hants & Sussex Aviation Limited. (W Dietz and D Jackson)

Report dated 10 November 1976 on fuel test prepared by J Hughes for the Director of Materials Quality Assurance, MOD.

Report dated 12 January 1977 on oil test prepared by R F Tollervey for Director of Materials Quality Assurance, MOD.

Report dated 29 October 1976 on parts of propeller control unit prepared by A Q D Laboratories. (Miss J W Harris and Mr V H Cripps)

Flight Test Report dated 1 October 1976 and addendum thereto prepared by D Cummings, Flight Test Engineer, Civil Aviation Authority, Airworthiness Division.

Copy letter dated 27 October 1976 from J R W Smith, Flight Test Engineer, Civil Aviation Authority, Airworthiness Division to Piper Aircraft Corporation.

Excerpt from Lycoming Operator's Manual.

Excerpt from Lycoming Parts Catalogue.

Excerpt from Tighening Torque Recommendations referred to in Lycoming Operator's Manual.

Report of LATCC FIR(N) Controller.

Flight Test Results by Mr Guinther for Hartzell.

Photographs.

Documents relating to Pilot's Aztec Training.

Engine Lubrication Diagram.

Letter from Pilot in Command of G-AYSF's previous flight.

Technical Log Sheet of G-AYSF's previous flight.

Aero-nautical Chart of Northern England.

Two Port Engine Log Books.

Port Propeller Log Book.

Piper Aircraft Corporation Flight Manual.

British Supplement to above Flight Manual.

McDonald Aviation Limited's Training and Operator's Manuals.

Certified Computer Print-out relative to reports concerning Hamilton Standard or Hartzell Propeller Governor Bolts or Nuts.

Port Engine Record.

Specification of C.S.U. Fixing.

Extract from Lycoming Operator's Manual.

Large Engine Drawing.

Copy Lycoming Service Letter.

Lycoming Engine Overhaul Manual.

Mr Light's Friction Horsepower Calculation.

C.A.A. Flight Test of G-AYSF.

C.A.A. Flight Test Schedule No. 3.

Drift Down Time Calculations for G-AYSF.

Three N.A.T.S. Radiotelephony Transcripts.

PRELIMINARY

Accident

1 During a charter flight from Blackpool to Perth on 27 July 1976 a Piper PA E 23 (Aztec) Series 250—G-AYSF struck a hill approximately 2,500 feet amsl. some 7 nautical miles north east of Moffat, Dumfriesshire at about 1756 hrs. The aircraft was destroyed by fire and the pilot and five passengers were killed. The flight in question was the return leg of a flight which had originated that morning at Perth in a Piper Aztec aircraft owned and operated by McDonald Aviation Limited although the

pilot was employed by Tayside Aviation Limited. The aircraft in which the flight commenced became unserviceable at Blackpool and the pilot obtained a substitute aircraft from Air Navigation and Trading Company Limited. The circumstances in which authorisation was granted by McDonald Aviation Limited to the pilot to effect this change were not disclosed. The aircraft G-AYSF had returned to Blackpool from Leeds under the command of another pilot shortly before the final take-off for Perth.

Investigation

2 The Chief Inspector of Accidents ordered Mr. Westlake, a Principal Inspector of Accidents to carry out an investigation into the accident. Mr. Westlake commenced the investigation with the assistance of Mr. Cairns, an Operations Inspector and Mr. C A Protheroe, an Engineering Inspector. Mr Westlake retired before the investigation was completed and Mr Cairns subsequently died. Mr P J Bardon thereafter became Principal Inspector and completed preparation of the report for submission to the Secretary of State for Trade. A copy of the proposed report was, pursuant to regulation 11, served upon Hartzell Propellers Inc, *inter alios*.

3 Hartzell Propeller Inc (hereinafter referred to as "Hartzell") gave notice that they wished the findings and conclusions in the report to be reviewed by a Review Board under Regulations 12 and 13.

Proceedings of Review Board

4 On 9 October 1978 a Preliminary Meeting was held at which directions were given for the preparation and conduct of the Review.

5 At that meeting the following parties were granted leave to appear at the Review under Regulation 13(7):

Piper Aircraft Corporation

McDonald Aviation Limited

Air Navigation and Trading Company Limited

The Civil Aviation Authority

The representatives of the deceased passengers

The representatives of the deceased pilot

The Accident Investigation Branch of the Department of Trade.

6 On 15 November 1978 Captain Duncan McIntosh, OBE AFC (Pilot Assessor), Mr John Barker (Engineering Assessor) and I visited the Royal Aircraft Establishment at Farnborough in order to see the wreckage of the aircraft laid out in a hanger.

7 The Review Board sat in the Land Court, Edinburgh to hear evidence and submissions on nine days:

4, 5, 6, 7, 8, 11, 12, 13 and 14 December 1978.

8 Oral evidence was given by:

Mr R F Tollervey, Higher Scientific Officer of the Materials Quality Assurance Directorate of the Ministry of Defense.

Mr D W Squire, Chief Engineer of C.S.E. Aircraft Services Ltd.

Mr J R W Smith, Flight Test Engineer, Civil Aviation Authority.

Mr C A Protheroe, Inspector of Accidents.

Mr P J Bardon, Principal Inspector of Accidents.

Mr W B Harlament, Chief Engineer, Hartzell Propeller Inc.

Mr J Bailey, Vice President of Aerospace Management Services International.

Mr W M Guinther, Pilot Instructor.

Mr V H Cripps, Senior Technical Officer, A.Q.D. Laboratories, Harefield.

Mr A E Light, Vice President Engineering, AVCO Lycoming Division, Lycoming Corporation.

Mr C F Wilson, Director of Engineering, Piper Aircraft Corporation.

Mr P E Reeve, Pilot Instructor.

Mr H Best Devereux, Consulting Aero-nautical Engineer.

Facts and Conclusions

9 In the absence of any RTF transmission from the aircraft indicating distress or emergency, and in view of the extensive fire damage which occurred after impact the Inspectors were forced to build up, so far as they could, from the material available a probable reconstruction of the circumstances of the accident. Mr Protheroe, who was principally concerned with this reconstruction and who was present at the *locus* before the wreckage was removed concluded that distribution of the wreckage and the damage sustained by the seat frames and fuselage frames pointed towards a spin-type impact in which the aircraft had a high rate of descent with little forward speed. This conclusion was broadly accepted by all the parties present at the Hearing. Mr Protheroe also found the following facts which appeared to him to be of particular significance:

(1) A dent in the leading edge of one blade of the port propeller and chordwise marks in the vicinity of the dent.

(2) Damage to the underside of the port spinner in contrast to more general damage to the starboard spinner.

(3) Witness marks in the propeller cylinder assembly.

(4) The position of the port engine control cables in the cockpit which was similar to that in which they would have been if the pilot had taken action to shut down the port engine.

(5) The latches in the port propeller cylinder assembly which retain the propeller close to the fine pitch stop were all wholly or partially engaged.

(6) All four nuts securing the port propeller governor unit were loose and a 10 thousand feeler gauge could be inserted between the mounting flange and the crankcase.

(7) There was a quantity of oil distributed on the inside of the upper panel of the port engine cowling.

10 From these facts Mr Protheroe reached the following conclusions which were accepted by Mr Bardon:

(1) that the Governor Unit had become loose before impact with a consequential leak of oil therefrom;

(2) that for some reason, probably because he became aware of the oil leak, the pilot attempted to shut down the port engine;

(3) that he was unable to feather the propeller because windmilling r.p.m had fallen unusually quickly below the minimum r.p.m. at which feathering was possible; and

(4) that this rapid decay of r.p.m. was due to increased friction in the engine consequent upon the loss of oil from the Governor Unit.

11 It was around these conclusions that the principal dispute took place.

Governor Unit

12 If the Governor Unit was loose before impact there can be no doubt that it could only have been as loose as it was found to be by Mr Protheroe for a very short time. The rate of oil loss through the gap at a pressure of 300 p.s.i. was calculated to be 2.7 imp. pints per minute which would have emptied the sump in a few minutes and this had not occurred. In reaching the conclusion that the Governor Unit had become loose before impact Mr Protheroe relied on the examination of the studs which secured it to the crankcase, which examination had been carried out by AQD Laboratories and on the amount of oil found on inside of the cowling. There was, however, some doubt as to the extent of that examination. Mr Protheroe thought that the threads in the light alloy casting of the crankcase which received three of the four steel studs had been examined and found to be intact whereas Mr Cripps who carried out the tests considered that no such examination had been made since no mention thereof appeared in the Test Report. He further considered that distortion would be more likely to have occurred in the light alloy casting than in the steel studs and agreed that in the absence of information as to whether there was distortion in the casting the investigation could not be assumed to be complete. Mr Light with whose evidence as a whole I was much impressed also thought that failure or deformation of threads would first be found in the casting as happened in the case of the vacuum pump mounting

studs and that in any event an examination after the studs had been withdrawn could destroy evidence of distortion because of the interference fit of the studs.

13 So far as the oil on the inside of the cowling is concerned there is no doubt that it could have come from a loose Governor Unit but it could also have come from other sources in the engine and the presence of oil in such a position and in such quantity is I am informed by my Assessors by no means unusual. It is reasonable to assume that the prosecution of inquiries at the premises of Air Navigation and Trading Company Limited would have cast some further light on the likely source or sources of this oil. However, Mr Protheroe did not interview any person who had been concerned with the maintenance of the aircraft during the weeks prior to its last flight nor did any such person give evidence. Furthermore no documentary evidence was obtainable from Air Navigation and Trading Company relating to the consumption of oil of either engine although I asked for production of any such records at the Preliminary Hearing and am informed by my Assessors that it would be very surprising if no such records had ever existed. Indeed the only information about the aircraft other than what was contained in the various logs produced was a short letter from the pilot who had flown it earlier on the day of the accident stating that during his flight there had been nothing unusual with the handling or the engine.

14 In the foregoing circumstances I consider that it would be unsafe to assume that the Governor Unit had become loose prior to the impact. However even if it had I am satisfied that no criticism can be levelled at the method of securing the nuts. Mr Protheroe agreed that the possibility of properly torque-tightened nuts coming loose was remote and Mr Light, in his very considerable

experience, had never heard of one properly torque-tightened Governor Unit nut slacking off after a substantial period of trouble-free operation let alone four such nuts at the same time. Mr Light further considered that the system of nut and washers used to secure the Governor Unit was entirely satisfactory. In the absence of any suggestion that properly torque-tightened nuts on a similar Governor Unit had ever come loose before I consider that Recommendation 4.2 is neither justified nor necessary.

15 However the condition of the Governor Unit immediately prior to the accident is really peripheral to the circumstances with which this Report is concerned since a leak of oil therefrom can have done no more than precipitate the chain of events which resulted in the crash.

Shutting Down the Engine

16 In concluding that the pilot had shut down the engine at some time before impact Mr Protheroe relied on the position in which he found the port engine control cables in the cockpit as well as on the damage to the blade of the port propeller. This damage in Mr Protheroe's view suggested that the propeller was not under power at the time of impact in contrast to the damage on the starboard propeller which indicated that it was powered. It was sought to argue that no inference could be drawn from the position of the control cables because such cables were frequently displaced in an accident particularly where the engine in question was separated from its mounting. While I have no doubt that control cables can be displaced in a crash I consider that it was highly improbable that random displacement of the cables could have produced a result so consistent with some action having been taken by the pilot to reduce significantly the power on the port engine. Furthermore no reason other than a sub-

stantial reduction in power on the port engine was suggested as the cause of the spin. In these circumstances I consider that the pilot had probably moved the port engine controls to positions which would substantially reduce the power in the engine.

17 However I do not consider that it can be inferred on a balance of probabilities that the pilot had pulled the pitch control lever as far back as the feather position. On examination at the *locus* the difference in extension of the two throttle control cables was found to be 1.95 inches which, with a normal designed travel of 2 inches was indicative of full throttle on the starboard engine and closed throttle on the port. The difference in extension of the two propeller pitch control cables was 1.5 inches and the normal designed travel thereof was 2.25 inches. Thus if the two propeller pitch control cables had been in their relative positions at the time of impact the result would have been either that the starboard propeller pitch had been selected to coincide with the highest r.p.m., i.e. 2575 and the port control had not been pulled sufficiently far back to feather the propeller, which only occurs in the last one-half inch of travel, or the port propeller had been feathered but the starboard lever had not been operated to produce full power. Both of these situations would have had a deteriorating effect on performance but from a consideration of the controls alone neither can be said to be more likely than the other.

Position of Propeller on Impact

18 Mr Protheroe concluded that the port propeller had not been feathered from the damage which he found thereon, and from the witness marks on the inside of the propeller cylinder assembly. The marks on the propeller blade and the damage to the spinner led him to believe that the propeller struck the ground in a position about 8

to 2 o'clock when viewed from the front and in fine pitch with the latches engaged. The witness marks were consistent with the piston in the cylinder assembly being very close to the fine pitch stop.

19 Mr Harlament on the other hand considered that the blade was driven into the fine pitch position by the impact having immediately prior thereto been at an angle of about 35°. He explained in considerable detail by reference to a model how, with the blade in approximately the same position in the quadrant as that assumed by Mr Protheroe, and at any angle from 15° to the feather angle of 80° the force applied by the downward movement of the aircraft when the tip hit the ground would bend the blade forcing it to rotate in an aft direction until the load applied to it forced the stop screw against the fine pitch stop by which time the latches would have engaged. The witness marks found on the fine pitch screw were consistent with the application of such force. Mr Harlament then expressed the view that by reason of certain marks on the pre-load Plates the blade had probably been at an angle of 35° on impact.

20 I do not consider that the marks on the pre-load Plates upon which Mr Harlament relied, when these marks are compared with other pre-load Plates which were produced, support his conclusion as to the precise angle of pitch of the propeller when it hit the ground. I was however impressed by his evidence as to the likely effect of the impact on the blade and his reasons for concluding that the latches were not engaged at the time of impact. I therefore consider that it is more likely that the latches were not engaged when the propeller struck the ground.

Behaviour of Port Engine on Pilot Reducing Power

21 In his speech at the conclusion of the evidence Counsel for the Accident Investigation Board submitted

that it was no longer appropriate to suggest that there was increased friction in the port engine as a result of the loss of oil. I consider that Counsel was absolutely correct in making this submission. The evidence of Mr. Light as to the method of lubrication of the engine demonstrated conclusively that even if there had been a substantial loss of oil from the engine in flight it could not in view of the condition in which the engine was found have resulted in any increased friction due to overheating.

22 This submission by Counsel for the Accident Investigation Board must have a profound effect upon the conclusion that the latch engagement occurred at an air speed higher than normal. Although I have reached a conclusion that the latches were probably not engaged at the time of impact there can be no certainty in a matter such as this and it is proper that I should also consider the Findings which are subject to challenge upon the basis that the latches were engaged. Counsel submitted that notwithstanding the fact that any oil leak did not increase the engine running friction nevertheless the Board should have regard to possible variations in engine friction as a general proposition as a possible cause of latch engagement at a higher air speed than normal. I do not consider that this proposition has any foundation in fact.

23 Having regard to the distance travelled and the time which had elapsed since take-off it was generally agreed that at the time of the last radio transmission at 1752 hrs. the engines were likely to be turning over at about 2400 r.p.m. In normal course of events after closing the throttle of an engine several seconds will elapse before the windmilling r.p.m., if indeed it is going to fall so far, falls below 1000 which is the limit below which, according to the Flight Manual, feathering is impossible, although in fact feathering is still possible at least down to 900 r.p.m. and possibly to 800 r.p.m. At the best single engine

rate of climb which is 102 m.p.h. windmilling speed would stabilize at 1400 r.p.m. The time required to pull back the throttle lever to the closed position and to pull back the pitch control lever to the feather position is minimal. Thus unless r.p.m. had decayed abnormally fast after closing the throttle a situation would never arise in which, the normal procedure having been carried out, feathering would be impossible if the throttle were closed down from cruising speed. Such abnormal decay in r.p.m. from 2400 could not have occurred without some mechanical reason. No such reason, other than increased friction due to loss of oil was advanced and since that reason is now accepted as no longer valid I am driven to the conclusion that if the r.p.m. of the port engine did fall below that at which feathering was possible this was not due to any mechanical reason. It is significant that Mr. Wilson, the Engineering Director of the Piper Aircraft Corporation knew of no case in their testing of the Aztec Aircraft where feathering had been impossible.

Maintenance of Height with Windmilling Propeller

24 In the proposed Report it was stated that "the effect of a windmilling propeller compared with a feathered propeller on a failed engine is therefore a decrement of 350 ft/min in Flight Manual Schedule data". This statement was based on tests carried out by Mr Cummings on a Piper Aztec "E" model G-AZWW on 3 September 1976. During the course of the hearing it was agreed that these results were not typical of an Aztec in as much as the performance of the live engine of the aircraft in question was sub-standard. The witnesses from the Accident Investigation Branch considered that a decrement of 220 ft/min was a more likely figure which would give a net rate of descent of about 50 to 75 ft/min. Hartzell relied on tests carried out by Mr. Guinther on 22 November 1978 which showed that from 2000 to 3000 ft. with the left

engine windmilling, the mixture control on, IAS 101.2 m.p.h. and the outside temperature at +1°C a Piper Aztec with a gross weight at take-off of 4940 lbs climbed at the rate of 125 ft/min. Adjusting these figures to the temperature prevailing at the time of the accident would reduce the above rate by 35 to 40 ft/min. Furthermore these figures were carried out with the engine mixture control on which would mean that the engine was delivering idling power and therefore the propeller was producing less drag than if it was being driven wholly by the airstream. Mr Wilson had not carried out tests but he thought a figure of 220 ft/min decrement was reasonable although it might be somewhat on the high side. Evaluating this evidence as best I can and with the benefit of advice from Captain McIntosh the Pilot Assessor I consider that it is probable that if the port engine throttle had been closed, the mixture control off, the propeller windmilling and maximum power on the starboard engine the aircraft would not have been able to maintain height.

25 It was suggested that because of the results of an airworthiness test carried out on 13 May 1976 the performance of G-AYSF was substantially above average and that therefore even assuming that a 220 ft/min decrement was appropriate for a windmilling propeller nevertheless because of the increased rate of climb resulting from the extra performance deduction of that decrement would still leave a net rate of climb albeit small. The fact in the test upon which the foregoing argument was rested was the entry of 2450 r.p.m. as the continuous maximum power at which the single engine climb test was carried out, whereas maximum continuous power is developed at 2575 r.p.m. Since the rate of climb at the stated r.p.m. was 10 ft/min above the scheduled rate it followed that with maximum power on the live engine a rate of climb of the order of 80 ft/min in excess of the scheduled rate would have been achieved.

The person who carried out the test did not give evidence and I am advised by Captain McIntosh that it is unlikely in the extreme that anyone would have conducted such a test with reduced rather than maximum power on the live engines. I do not therefore consider that any reliance can be placed on the figure of 2450 r.p.m. in evaluating the performance of G-AYSF.

Findings in Relation to Challenged Conclusions

26 *Finding (iii)* can no longer stand in view of my conclusions (a) that it would be unsafe to assume that the Governor Unit had become loose prior to the impact and (b) as to the position of the latches at the moment of impact.

27 *Finding (iv)* has already been emasculated by Counsel for the Accident Investigation Board's submission that it was no longer appropriate to suggest that there was increased engine running friction due to a partial loss of oil. However as I have also reached a conclusion that the latches were not engaged at the time of impact it follows that no part of this finding can stand. As I have already remarked even if the latches were engaged no mechanical reason has been advanced for their engagement at an air-speed higher than normal.

28 *Finding (v)* is a wholly accurate comment on the Feathering Procedure in the Flight Manual. However as I have reached a conclusion that feathering was not impossible and that in any event there was not reason for the r.p.m. to have fallen so rapidly as to engage the latches before feathering could take place and in view of Mr Wilson's evidence that he knew of no case during testing where feathering had been impossible I can no longer see any content for this finding.

29 *Finding (vi)* can properly stand for the reasons which I have given under the immediately preceding heading.

30 *Finding (vii)* was not challenged.

31 *Finding (viii)* ceases to have relevance to the accident in view of my conclusions as to the probable state of the Governor Unit nuts at the time of impact.

Cause

32 The cause as set out in the proposed Report is now no longer appropriate and should read "The accident was probably caused by a loss of control following an attempt by the pilot to shut the port engine down. The aircraft entered a spin from which there was insufficient height to recover".

Other Matters in Report

(1) *Factual Information*

33 1.12.2.1. (a) the words "and the crank case thread was also undamaged" at the end of the third paragraph fall to be deleted for the reasons which I have more fully developed under the heading of Governor Unit.

(b) the last sentence of the fourth paragraph should also be deleted for the above reasons.

34 1.12.2.3. In view of my conclusion as to the latches probably not being engaged at impact the second paragraph cannot stand in its present form and should be amended to read as follows:

("The examination of the pitch change mechanism and the damage thereto indicated that at the time of impact the latches were probably not engaged. The point of latch engagement for this

type of propeller varies between individual propellers, but should lie in the range 19 to 22°. The fine pitch stop is normally set to approximately 14½° and the feather position is normally between 79 and 81°.")

35 1.16 Mr Bardon explained that the words "Flight Manual" at the bottom of page 9 should read "Owners Handbook".

36 The second paragraph on p10 accurately summarises the tests carried out by Mr Smith. However these tests were not carried out in order to reproduce the assumed situation which prevailed at the time of the accident but rather, as Mr Smith said, to obtain "factual information which substantiated the claims of the Flight Manual". Mr Smith further stated that he did not think that the data derived from the tests had any relevance to the accident.

37 The third paragraph on p10 which accurately summarises the test carried out by Mr Cummings must now be read subject to the qualification that the starboard engine of the aircraft in question was sub-standard in performance and that a more likely figure of decrement when the live engine was developing normal power would be 220 ft/min.

(2) *Analysis*

38 In view of the conclusions which I have reached as to (a) the latches being disengaged at the time of impact, (b) the Governor Unit having been slackened by the impact, (c) there having been no mechanical reason for any unusual decay r.p.m. on closing the throttle of the port engine the fourth and subsequent paragraphs of the analysis are substantially superseded and I do not consider that it would be profitable to attempt to correct and redraft them in detail.

39 However in view of the submissions which were made to me I think it right to comment on the following sentence on p12 of the proposed Report:

> "Certainly the necessity to maintain 1000 r.p.m. in order to feather ought to be given greater prominence in the Flight Manual than is the case".

40 The relevant entry in the Flight Manual is as follows:

> "*Feathering Procedure*
>
> Open operative engine throttle to maintain altitude and airspeed. MAINTAIN AT LEAST 102 MPH (BEST SINGLE ENGINE RATE OF CLIMB).
>
> Inoperative engine procedure is as follows:
>
> a. "CLOSE" throttle
>
> b. Prop control "FEATHERED". PROPELLER CANNOT BE FEATHERED UNDER 1000 RPM.
>
> c. Mixture control "IDLE CUT-OFF".
>
> d. Ignition switches "OFF".
>
> e. Electric fuel pump "OFF".
>
> f. Main fuel valve "OFF" inoperative engine."

41 Feathering is not a procedure which is only carried out by a pilot when an engine becomes inoperative but a procedure which he requires to carry out as a preflight test before every take-off. Thus a pilot must be aware of the Flight Manual procedure before he ever flies the aircraft and in these circumstances the fact that the words "PROPELLER CANNOT BE FEATHERED UNDER 1000 RPM" succeed rather than precede the words "Prop Control" "FEATHERED", ceases to have any significance since the pilot is not operating the controls and reading the

Flight Manual at the same time. Indeed Captain McIntosh advises me that as matter of practice a pilot should know all the information contained in the first 8 pages of the Flight Manual by heart. In these circumstances I see no need for any alteration of the way in which the feathering procedure is set out in the Flight Manual.

Other Matters

42 The conclusions which I have arrived at in relation to the Challenged Conclusions and the Analysis are unsatisfactory insofar as they substitute no positive conclusions for those of the Inspectors which I have rejected. No-party [sic] to the Review Proceedings sought to put forward any positive alternative reason why this accident happened and no evidence emerged from which I could safely draw any conclusion as to a positive alternative. Indeed it is implicit in the proposed Report and the detailed reasoning therein contained that any conclusion as to the cause of this accident could only be reached by making assumptions from such material as was available. However there are certain matters upon which it is appropriate that I should comment.

Reason for Pilot Reducing Power on Port Engine

43 If there was no oil leak from the Governor Unit why did he do it? This must necessarily be speculative but it is not without significance that the port engine log book contained a great number of entries covering general maintenance work which suggests that this engine might have been a rougher unit than the starboard. When the fuel injection nozzles of the port engine were flow tested after the accident by C. S. E. (Aircraft Services) Ltd one was found to be blocked and the other five had erratic flow. If the nozzles were in those conditions before the accident they would, I am advised by my Assessors,

undoubtedly have produced rough running. The pilot had never flown this aircraft before the flight and it is therefore possible that he had been concerned by the rough running of the port engine and reduced power.

Height of Aircraft Prior to Accident

44 At 1747 hrs. the pilot informed Sc. A. T. C. C. that he was descending to 3000 ft. to remain V. M. C. and at 1752 hrs., he informed Sc. A. T. C. C. of his intention to climb back to F. L. 35 to remain "V. M. C. on top". At this time his route involved flying over high ground up to 2756 a.m.s.l.

45 The Operations Manual of McDonald Aviation Limited who were the operators of the aircraft, provides *inter alia*:

"35-00 *MINIMUM SECTOR ALTITUDE*

The minimum flight altitude as defined below will be recorded on all Company Flight Plans.

(a) *Flight in controlled airspace* where the track is well defined by two separate aids not greater than 100 NMS apart, the minimum sector altitude will be 1500 ft. (on QNH) above the highest terrain or obstacle within 10 NMS of the intended track.

(b) *All other Flights*

1500 ft. (on appropriate QNH) above the highest ground or obstacle within 20 NMS of the intended track.

(c) For flights within 20 NMS of terrain having a maximum elevation exceeding 2,000 ft., the above clearance of 1500 ft. must be increased in accordance with the table below,

this applies to all flights including those in controlled airspace. The Captain must be conversant with the effect of Mountain Waves as outlined in Information Circular 7/68.

35-01

Elevation of Terrain	Windspeed			
	0-30	31-50	51-70	OVER 70
2 - 7000′	500′	1000′	1500′	2000′
Above 7000′	1000′	1500′	2000′	2500′

"

46 It is clear that immediately before the accident the pilot was not carrying out the above instructions.

47 If immediately before the accident the pilot was flying in or near the tops of cloud as Mr Bardon assumed it would appear that he was not observing rule 23(a)(i) of the rule of the air and Air Traffic Control Regulations 1974 (SI No. 1401) which provides:

"23. The Visual Flight Rules shall be as follows:

(a) Outside controlled airspace

(i) an aircraft flying outside controlled airspace above 3,000 feet above mean sea level shall remain at least one nautical mile horizontally and 1,000 feet vertically away from cloud and in a flight visibility of at least five nautical miles;"

48 While the height at which the pilot was flying immediately before the accident was in no sense a cause of the events giving rise to the accident, there is no doubt that had he been flying higher above the ground there would have been more time available for him to recover from the spin.

Pilot Inexperience and Error

49 The Pilot who was 22 years of age at the time of the accident had obtained his commercial pilot's license on 3 May 1976. He had commenced training with Tayside Aviation Limited on an Aztec on 27 April 1976 and completed it on 30 April 1976. He had thus less than 3 months experience in flying Aztec's between the conclusion of his training and the date of the accident.

50 It was suggested to Mr Bardon in cross-examination that the pilot had stalled the aircraft but he rejected this suggestion on the ground that this "would require a piece of really gross mishandling on his part". Mr Bardon having reached a conclusion that the latches had engaged prior to impact also rejected the suggestion that any action of the pilot had caused the latches to reach that position before the pitch control lever had been operating. I do not think that I am being unfair to Mr Bardon in stating that he never really considered that there might have been a human rather than a mechanical cause for this accident. In the light of the pilot's very limited experience I am not sure that this was not rather too naive an approach.

51 Even if the port propeller could not have been feathered this should not necessarily have produced fatal consequences. I am advised by Captain McIntosh that in the conditions prevailing at the time an experienced pilot would have been able to arrest any spin which developed by reducing power on the starboard engine and might well have been able to land the aircraft on flat ground without such disastrous consequences as here occurred.

52 There was not before me such evidence as would justify the making of any finding that the accident resulted from an error on the part of the pilot. However there

being no mechanical explanation for the aircraft developing a spin, other than possible rough running of the port engine which may have induced the pilot to reduce power I do not consider that a human cause be it attributable to error or merely to lack of practical experience in circumstances other than normal can be altogether ruled out.

/s/ C E JAUNCEY

We agree with the contents of this Report.

/s/ DUNCAN MCINTOSH
/s/ JOHN C BARKER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehily, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
C. A. No. 77-1159

Argued May 22, 1980
Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

(Filed July 24, 1980)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

This is an appeal from a dismissal of a wrongful death action on grounds of forum non conveniens. The issues include the factors to be considered in such a dismissal, the burden of persuasion on the motion, the scope of the trial judge's discretion, and the application of choice of law rules of California and Pennsylvania.

The event giving rise to this dispute was the crash of a Piper aircraft in Scotland in July 1976. The plane was owned by a Scottish air taxi service, the passengers and crew of which were Scottish. All persons aboard were killed and no witnesses survived the crash. There are indications, however, that something went wrong with the left engine for which compensatory action by the pilot was impossible, was unnecessarily difficult, or was ineptly handled by the pilot.[1]

Gaynell Reyno, a California resident and personal representative of the estates of various Scottish decedents,

1. Determination of these issues by the ultimate factfinder, of course, will be dealt with when the merits of the case are reached.

sued on their behalf in a California state court. Named as defendants were Piper Aircraft Corp., a Pennsylvania corporation that manufactured the aircraft; Avco Lycoming Engine Group, which produced the engine; and Hartzell Propeller, Inc., an Ohio corporation that built the propeller. The wrongful death action is based on theories of strict liability and negligence.[2]

On motions by Piper and Avco based on diversity of citizenship, the case was removed from the California state court to the federal district court in California. After the removal, Hartzell moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Middle District of Pennsylvania under 28 U. S. C. § 1404(a).[3] Piper moved to dismiss for failure to state a cause of action or, alternatively, to transfer the case to the Middle District of Pennsylvania and to strike the claim for punitive damages. The action was dismissed as to Avco with the agreement of plaintiff.

The district court in California entered an order (1) granting the motion to quash service of process as to Hart-

2. Plaintiff contends that the engine malfunction itself was the result of a design or manufacturing defect for which Piper is liable. In addition, the following dangerous and defective conditions in the aircraft are alleged: (1) inadequacies associated with the left propeller mechanism that prevented institution of emergency procedures in the event of engine loss; (2) design and manufacture of an aircraft incapable of single engine flight with a "windmilling" propeller; (3) manufacture of an aircraft with improper instruments for maintaining single engine operation; and (4) inaccuracies and omissions in the Aircraft Owners Handbook and flight manuals pertaining to emergency procedures and single engine operating speeds.

3. That section provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

zell on the ground that personal jurisdiction over Hartzell was neither authorized by California law nor in accord with due process; and (2) transferring the case to the Middle District of Pennsylvania pursuant to § 1404(a).

Subsequent to the transfer, Hartzell was validly served with process in Pennsylvania and then moved to dismiss the case on the common law ground of forum non conveniens. Piper filed a similar motion captioned as a request for judgment on the pleadings or summary judgment. Both motions were accompanied by affidavits. On the basis of the affidavits, the trial judge granted the motions to dismiss because of forum non conveniens on condition that defendants submit to personal jurisdiction in Scotland and waive any statute of limitations there. Reyno filed a timely appeal.

In this Court, Reyno raises two major contentions: (1) The judge erred in not holding defendants equitably estopped to assert that Scotland was a more appropriate forum, inasmuch as Piper had maintained in California that Pennsylvania was the most appropriate forum. (2) The trial judge abused his discretion in dismissing the action. Subsidiary, but arguably crucial, to this second point is the claim that the district judge's order was based on a legal error as to whether Scottish or Pennsylvania law applied to most or all of the case.

I. The Interaction of a Transfer Under § 1404(a), a Subsequent Forum Non Conveniens Motion, and the Concept of Preclusion

Reyno argues that the district court erred in not considering whether the defendants were equitably estopped from moving to dismiss. Essentially, she contends that, by following a successful motion to transfer the case from California to Pennsylvania with a motion to dismiss so that the case would have to be filed in Scot-

land, the defendants are trifling with the court and wasting judicial and litigant time and resources.

The district court's opinion did, however, consider plaintiff's argument and rejected it, albeit in a somewhat summary fashion:

> No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. . . . The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for forum non conveniens first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.[4]

The Court of Appeals for the Fifth Circuit has reversed the dismissal of an admiralty claim on forum non conveniens grounds for the reasons now pressed by Reyno. It declared that the defendant should not be permitted, after securing a statutory transfer from Louisiana to Georgia, to contend that Georgia was not really an appropriate forum; the defendant "may not 'so trifle with the judicial process.'"[5]

Defendants here urge, and the district court seemed to accept, that they did not take inconsistent positions before the district court in California and that in Penn-

4. 479 F. Supp. at 738.

5. Insurance Co. of North America v. Ozean/Stinnes-Linien, 367 F. 2d 224, 227 (5th Cir. 1966) (quoting Livesay Ind. v. Livesay Window Co., 202 F. 2d 378, 382 (5th Cir.), *cert. denied*, 346 U. S. 855 (1953)).

sylvania. The motion in California, defendants argue, simply represented that Pennsylvania was a better forum than California, whereas the present motion contends that Scotland is better yet. Furthermore, they aver, any inconsistencies are a result of fuller knowledge of the relevant facts.

Examination of the motions made by defendants in California reveals that their prior allegations are indeed at variance with their present contentions. A statutory transfer, as well as a common law dismissal, must be shown to be not only more convenient, but also in the interest of justice. In meeting that burden, Hartzell asserted in California that "the plaintiffs would easily have their interests herein protected and adjudicated by application to the courts located in the State of Pennsylvania, and in fact such would be overwhelmingly fair to all the parties herein." [6] Similarly, Piper argued that "[t]he propriety of transferring the within action to Pennsylvania for the convenience of the witnesses appears to overwhelm other factors, in view of the apparent theories of liability as against the defendants." [7]

Both defendants averred that, because the claim was based on strict liability, virtually all the evidence and material witnesses as to production and design would be in Pennsylvania or Ohio.[8] Furthermore, they argue that

6. Hartzell's Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Jurisdiction over the Person or for Transfer under 28 U. S. C. § 1404(a) at 8. No. CV-77-3181-IH (C. D. Cal., filed Oct. 11, 1977).

7. Piper's Memorandum of Points and Authorities in Support of Motion to Transfer under 28 U. S .C. § 1404(a) at 6. No. CV-77-3181-IH (C. D. Cal., filed Nov. 23, 1977).

8. Hartzell stated in its memorandum that "the records and employees of the . . . defendants herein are prospective evidence and witnesses, respectively." Piper asserted, "Necessarily, it would seem that all material witnesses on the liability issues reside in

new facts bearing on forum non conveniens were discovered after motions were filed in California.

At the time of the transfer motion all facts now alleged to be relevant—*e.g.*, where various witness are, where the crash occurred, where the wreckage was located, and who owned the plane—were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum non conveniens motion, they are hardly surprising or significantly new. What defendants really are arguing is that the case was not thoroughly researched before making the transfer motion.

Nevertheless, two factors weigh against an absolute preclusion to raise a forum non conveniens motion in this case: (1) The thrust of Hartzell's motion in the California court, and the contention accepted by that tribunal, was lack of personal jurisdiction. Arguably, then, it is not fair to make Hartzell responsible for proceedings there, even if it would be fair and proper as against Piper. (2) Forum non conveniens entails important considerations of public interest, in addition to those of the private litigants themselves. If defendants are correct in their assertion that trial in Pennsylvania would be unduly burdensome to the

8. (Cont'd.)

either Pennsylvania or Ohio." In reply to plaintiff's opposition to the transfer, Piper argued that the respective employees of Piper . . . and Hartzell Propeller, who were involved in the design, manufacture, testing, and assembly of the component parts in question, will be material witnesses, but they are located in Pennsylvania and Ohio. It is clear that the convenience of these witnesses is better served if the within action is pending in the State of Pennsylvania than if it is pending in the Central District of California."

court and the juror community, it might be self-defeating to raise an absolute barrier to pleading forum non conveniens. Hence, although a party who moves for transfer under § 1404(a) will not be automatically estopped to assert forum non conveniens after a transfer is accomplished, the fact that a party previously succeeded in a statutory transfer ought to be weighed against dismissing for forum non conveniens and as adding to a defendant's already substantial burden on the later motion.

II. Forum Non Conveniens Dismissal

The doctrine that an otherwise validly brought claim may be dismissed because the forum chosen was inconvenient for trial had its origin in the common law of Scotland,[9] became part of the common law of many states,[10] and has a long history of use in federal admiralty actions.[11] It was introduced into federal diversity jurisdiction by *Gulf Oil Corp. v. Gilbert*[12] and *Koster v. (American) Lumbermens Mutual Casualty Co.*,[13] decided in 1974.

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9. Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909-11 (1947). The issue of inconvenient forum as a question on the merits rather than of jurisdiction may be traced at least to 1845. See *id.* at 909 (citing M'Morine v. Cowie, 7 Dunl. 270 (1845)).

10. *See* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929); Braucher, *supra* note 9, at 911-12.

11. The doctrine in admiralty is thought to derive from dictum in Mason v. The Ship Blaireau, 6 U. S. 143, 157, 2 Cranch 240, 264 (1804). *See* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Rev. 12, 12 & n. 10 (1949); Braucher, *supra* note 9, at 920 & n. 79. *But cf.* Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 505 n. 4 ("The doctrine did not originate in federal but in state courts.").

12. 330 U. S. 501 (1947).

13. 330 U. S. 518 (1947).

Simple in enunciation but complex in application, the principle of the doctrine is "that a court may resist imposition upon its jurisdiction even when" neither jurisdiction nor venue is defective.[14] Forum non conveniens as a common law doctrine has been dormant for purposes of interstate dismissals within the federal system since the passage of 28 U. S. C. § 1404(a) soon after the two seminal Supreme Court cases.[15] That statute is similar to the common law doctrine, but authorizes transfers within the federal court system with a lesser burden—both substantively and procedurally—than a motion to dismiss.[16]

The question whether federal or state law of forum non conveniens applies in a diversity case was left open by the Supreme Court and has not definitively been decided by any court of appeals.[17] In this case, as in many

14. Gulf Oil Corp. v. Gilbert, 330 U. S. at 507.

15. 62 Stat. 937 (1948) (codified at 28 U. S. C. § 1404).

16. The statute is a revision rather than just a codification of forum non conveniens. It permits federal courts to grant transfers on a lesser showing of inconvenience than is required under the common law doctrine and there is no need for pleadings or documents to be refiled in the transferee court. The relevant factors to be considered, however, are the same. Norwood v. Kirkpatrick, 349 U. S. 29, 32 (1955).

17. The Erie question was a matter in controversy in both *Gilbert* and *Koster* until the cases reached the Supreme Court. In *Gilbert* the district court, relying on Weiss v. Routh, 149 F. 2d 193 (2d Cir. 1945), held New York law to apply and dismissed the action. 62 F. Supp. 291, 294 (S. D. N. Y. 1945). The Court of Appeals distinguished *Weiss*, held that federal law controlled, and reversed the trial judge for abuse of discretion. 153 F. 2d 883, 886 (2d Cir. 1946). A separate panel deciding *Koster* also applied federal law, but cautiously noted that the result would have been the same under state law. 153 F. 2d 888, 890 n. 2 (2d Cir. 1946). In considering the merits of the dismissal, the Supreme Court relied exclusively on Supreme Court cases, but then avoided discussion of the *Erie* problem with the following:

brought before the federal courts, federal law has been

17. (Cont'd.)

> The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. . . . It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

330 U. S. at 509 (citations to New York cases omitted). In *Koster* the Court was equally inscrutable. *See* 330 U. S. at 529 ("Since this case is pending in New York and is a diversity case, it is appropriate to observe that the law of New York, if applicable, is to the same effect as to the considerations to govern forum non conveniens questions in this class of cases.")

The Court's decision not to decide was sharply criticized by Professor Braucher who observed that it

> seems to have been arrived at by something like main force: in the *Koster* case it was contrary to the unanimous view of the circuit judges [that federal law applied], and in the *Gilbert* case it was reached only by ignoring the state court decision most nearly in point, which had been cited with approval by the New York Court of Appeals. Since the circuit court of appeals had not regarded the New York law as controlling, previous decisions suggest that if New York law were held to govern, the normal practice of the Supreme Court would be to remit the case to the lower court to determine that law.[123]
>
> 123. Wertheim v. Clergue, 53 App. Div. 122, 65 N. Y. Supp. 750 (1st Dep't 1900); *see* Gregonis v. Philadelphia & R. C. & I. Co., 235 N. Y. 152, 139 N. E. 223, 225 (1923). The *Wertheim* case reversed dismissal of an action based upon false representations in the inducement and performance of a contract on the ground there was no discretion in "cases arising out of commercial transactions and affecting property." 53 App. Div. at 126, 65 N. Y. Supp. at 753. The Supreme Court relied on New York cases containing general statements that there is discretion to dismiss tort actions.

Braucher, *supra* note 9, at 928 (footnotes 122 and 124 omitted). Since the *Gilbert* and *Koster* cases, the Second Circuit has altered its position to indicate that the Erie question is an open one. *See* Thomson v. Palmieri, 355 F. 2d 64, 66-67 (2d Cir. 1966).

argued at all stages in the litigation.[18] Upon specific request for supplementary briefing in this Court, all three parties agree that if a choice is necessary, federal law should be followed, and cite numerous district court opinions and commentaries in support of that position.[19]

18. *See* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 434 n. 13 (D. C. Cir. 1976) ("Although the issue has never been squarely addressed by this Court, federal courts in the District [of Columbia] have in practice used the federal law of *forum non conveniens*.")

19. A footnote in *Koster* addressing the question whether federal courts have discretion to decline granted jurisdiction strongly points, along with the structure of the Court's reasoning in both *Gilbert* and *Koster*, toward use of federal rather than state law:

> Some of our cases appear to hold broadly that the federal courts must exercise their jurisdiction, when they have it, [citing cases]. But this is not a case in which it is urged that a state statute restricting remedy to state proceedings defeats federal diversity jurisdiction, as [those cases] were . . . . In those cases, the Court held that when a state recognizes a cause of action, suit may be brought on it in federal court if diversity jurisdiction is established. That holding has nothing to do with this case. *We are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.*

330 U. S. at 520 n. 1 (emphasis added). Moreover, in Parsons v. Chesapeake & O. R. Co., 375 U. S. 71, 73 (1963), which was not a diversity case, the Court held that "a prior state court dismissal on the ground of forum non conveniens can never serve to divest a federal district judge of the discretionary power [to transfer a case under § 1404(a)]." Virtually all the district courts and commentators that have squarely faced the issue have decided to apply federal law. *See, e.g.*, Poe v. Marquett Cement Manuf. Co., 376 F. Supp. 1054, 1057-59 (D. Md. 1974); Lapides v. Doner, 248 F. Supp. 883, 885-94 (E. D. Mich. 1965); Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 834-36 (S. D. N. Y. 1957); 1A (pt. 2) Moore's Federal Practice ¶ 0.317[2], at 3232-33 (2d ed. 1978); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3828, at 181 & n. 19 (1976).

They assert, nevertheless, that it is probably not necessary to decide between federal and state law because the cases dealing with forum non conveniens in both California and Pennsylvania have mirrored federal law in all essential respects. We agree.[20]

A. *Comparative Burdens, Trial Court Discretion, and Standard of Review*

A plaintiff is generally conceded the choice of forum as long as the requirements of personal and subject matter jurisdiction, as well as venue, are satisfied. He should not be deprived of the advantages presumed to come from that choice unless the defendant clearly shows

20. Opinions of the Pennsylvania Supreme Court have adopted almost verbatim the factors to be considered that are set out in *Gilbert's* and *Koster*, scope of trial court discretion, and standard of appellate review. *See* Rini v. N. Y. Central R. Co., 429 Pa. 235, 240 A. 2d 372 (1968); Plum v. Tampax, Inc., 399 Pa. 553, 160 A. 2d 549 (1960). The section of the Restatement regarding forum non conveniens, on which the Pennsylvania courts also rely, in turn relies on the major federal cases. *See* Restatement (2d) Conflict of Laws § 84 note (1971). California's forum non conveniens doctrine, formerly of common law origin, is now statutorily codified at Cal. Civ. Proc. Code § 410.30, Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 858, 544 P. 2d 947, 950, 126 Cal. Rptr. 811, 814 (1976). California law precludes, except in extra ordinary cases, a trial court from dismissing on forum non conveniens grounds an action brought, as in this case, by a California resident. *Id.* at 859, 126, 544 P. 2d at 950, Cal. Rptr. at 814. An exception to this limitation is made where, also as here, a California resident sues in a representative capacity for foreign beneficiaries. *See id.* at 860 & n. 6, 544 P. 2d at 951 & n. 6, 126 Cal. Rptr. at 815 & n. 6. In all respects relevant to this case, then, we find no dissimilarities in the factors considered under federal and California law. *Cf.* Jagger v. Superior Court, 96 Cal. App. 3d 579, 585-87, 158 Cal. Rptr. 163, 166 (1979) (outlining California law in manner essentially following *Gilbert* and *Koster;* concluding that satisfaction in divorce action between foreign celebrities should be deferred to English courts).

facts that "either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." [21] A court must balance these private and public interest factors, "[b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." [22]

The district judge believed that the plaintiff's choice of forum is of diminished significance, and the defendants' burden of showing inconvenience correspondingly less, when the plaintiff—more precisely, the real parties in interest—is foreign or when the forum chosen is not the plaintiff's home ground.[23] Neither of these burden-shifting principles may be found in opinions of the Supreme Court or this Court.

In support of the proposition that less solicitude is due a foreign plaintiff's choice of forum, the district court relied on a decision of the District Court for the Southern District of New York which stated that a foreign plaintiff's "choice of forum should be given less weight than the choice of an American plaintiff." [24] The court of appeals affirmed the judgment in that case, but disapproved of the district court's characterization of the forum non

21. *Koster*, 330 U. S. at 524.

22. *Gilbert*, 330 U. S. at 508; *see* Schertenleib v. Fraum, 589 F. 2d 1156, 1164 (2d Cir. 1978) ("We begin by noting that plaintiff chose this forum and defendant resides here. This weighs heavily against dismissal."); Hoffman v. Goberman, 420 F. 2d 423, 426-27 (3d Cir. 1970).

23. 479 F. Supp. at 731.

24. Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 927 (S. D. N. Y. 1977), *aff'd on other grounds*, 588 F. 2d 880 (2d Cir. 1978).

conveniens doctrine applicable to noncitizens.[25] Indeed, as the Court of Appeals for the Second Circuit has recently held, the citizenship of the plaintiff does not affect the defendant's burden under *Gilbert* and *Koster*. American citizenship of the plaintiff does not increase the defendant's burden, just as foreign citizenship may not lessen it.[26]

The holding by the trial judge that a plaintiff's choice is entitled to less weight when it is not the plaintiff's state of residency is somewhat difficult to follow when, as here, that party has already been forced to cede the "home court advantage" as a result of the defendants' previous motion to transfer the case from California to Pennsylvania.[27] It would be the rare situation in which a defendant could complain of being vexed or harassed by defending a lawsuit on his home ground.

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25. See Farmanfarmaian v. Gulf Oil Corp., 588 F. 2d 880, 882 (2d Cir. 1978).

26. Alcoa Steamship Co., Inc. v. M/V Nordic Regent, No. 78-7054, slip op. at 5960-68, 5973 (2d Cir. Feb. 25, 1980) (en banc). The court of appeals en banc thus seems to have overturned without specific mention the panel holding in Olympic Corp. v. Societe Generale, 462 F. 2d 376, 378 (2d Cir. 1972), that the defendant's burden is greater if an American plaintiff is to be relegated to a foreign forum. The *Olympic Corp.* opinion was also relied on by the district court here.

27. Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 F. R. D. 445, 453 (D. Del. 1978). The district court relied on Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 451 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976), which may have relied too literally on *Koster's* mention of deference to a plaintiff's choice of his home forum in setting forth the defendant's burden of establishing inconvenience. *See* 330 U. S. at 524. It is apparent that the *Koster* court was simply setting forth the proposition that, as between diverse citizens, convenience of a particular forum to one party will almost inevitably mean inconvenience to the other. Given this trade-off, the plaintiff's choice will generally be respected.

Of course, the Supreme Court has stated that "[t]he doctrine [of forum non conveniens] leaves much to the dicretion of the court to which plaintiff resorts," but this broad proposition was followed by the explanatory observation that "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." [28] The standard of review is one of abuse of discretion,[29] but if the trial court has not held the defendants to their proper burden or has clearly erred in weighing the factors to be considered, the equivalent of an abuse of discretion has been demonstrated. Discretion must be exercised within the applicable standards.[30] The district court's wide discretion may not serve the defendants as a burden-shifting device on appeal from an order in their favor.

B. *The Applicable Factors*

The *Gilbert* Court divided the elements to be considered into those affecting the private interests of the litigants and those in which the public has an interest.

28. *Gilbert*, 330 U. S. at 508.

29. DeMateos v. Texaco, Inc., 562 F. 2d 895, 897 (3d Cir. 1977), *cert. denied*, 435 U. S. 904 (1978).

30. *Cf.* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 436 (D. C. Cir. 1976) ("Where, as here, there has been no *weighing* of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused."). By way of analogy, it appears appropriate to note that on appeal from the grant of a preliminary injunction, "the standard of appellate review is simply whether the issuance of the injunction, *in the light of the applicable standard*, constituted an abuse of discretion." Doran v. Salem Inn, Inc., 422 U. S. 922, 931-32 (1975) (emphasis added). Thus, an order for a preliminary injunction may be reversed if the trial court "commits an obvious error in applying the law, or makes a serious mistake in considering the proof." A. O. Smith Corp. v. FTC, 530 F. 2d 515, 525 (3d Cir. 1976); *see* Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 357 (3d Cir. 1980).

The former include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained.[31]

Also relevant is the inability to implead other parties directly involved in the controversy.[32] These various ingredients are weighed to determine the "relative advantages and obstacles to fair trial."[33]

Among the public interest factors are problems of creating court congestion and imposing jury duty in litigation centers that are removed from the origin of the controversy, the benefit in a matter of public concern of holding the trial in a place accessible to the locality, and the appropriateness of having the trial in a forum that is familiar with the law governing the case rather than having a court elsewhere untangle foreign law.[34]

We will examine each of these factors to determine whether the defendants met their burden.

C. *Private Interests*

1. *Convenience of Witnesses*

If a dismissal is to be premised on the convenience of witnesses, more than a mere allegation to that effect is

31. 330 U. S. at 508.

32. *Id.* at 511; Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976).

33. *Id.* at 508.

34. *Gilbert*, 330 U. S. at 508-09.

required. The rule for a statutory transfer, which is to be more readily granted, is no less applicable to a dismissal for forum non conveniens:

> The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than on numbers. One key witness may outweigh a great number of less important witnesses. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied.[35]

The district court opinion does not discuss the need for such a showing, but rather merely refers generally to witnesses as to damages and witnesses as to the potential supervening negligence of the Scottish air taxi service, all of whom are in Scotland.[36] Nor do the defendants direct us to any affidavits setting forth the requisite specific information, and our search of the record detects none. The requirement of specificity would seem more acute in this case in view of the fact, mentioned above, that in motions before the district court in California the defendants made the claim, in some sense inconsistent with the position now taken though perhaps more ac-

35. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3851, at 270-71 (1976); *see* Marbury-Patillo Construction Co., Inc. v. Bayside Warehouse Co., 490 F. 2d 155, 158 (5th Cir. 1974); Texas Gulf Sulphur Co. v. Ritter, 371 F. 2d 145, 148 (10th Cir. 1967). This rule has wide authority in the district courts as well. *See, e.g.*, Follansbee Metals Co., Inc. v. John T. Clark & Son of N. H., Inc., 387 F. Supp. 574, 581 (W. D. Pa. 1974); Clay v. Overseas Carrier Corp., 61 F. R. D. 325, 331 (E. D. Pa. 1973); Shulof v. Westinghouse Elec. Corp., 402 F. Supp. 1262, 1264 (S. D. N. Y. 1975).

36. 479 F. Supp. at 732.

curate, that all witnesses relevant to strict liability or negligence in manufacturing are in Pennsylvania or Ohio.[37]

At the least, then, the district court did not have sufficient information to weigh the convenience of witnesses, and its conclusion that this factor favored defendants appears to be without the requisite foundation.

One further error in discerning the balance of inconvenience to witnesses deserves mention. The trial judge stated that the convenience of expert witnesses, like that of counsel, "is of small importance."[38] No explanation was given for this assertion,[39] but the theory seems to be either that expert witnesses are fungible or that their testimony can be introduced effectively by deposition. We agree with the authors of a noted treatise that this view is unsound.[40] In this case, as in many others, the testimony of expert witnesses will be crucial. Finding the most trustworthy and credible experts is not often easy, and the advantages of live testimony are not to be discounted.[41]

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37. *See* pp. 5-6 & note 8 *supra*.

38. 479 F. Supp. at 732.

39. The district court cited Car-Freshner Corp. v. Auto Aid Mfg. Corp., 438 F. Supp. 82, 85 (N. D. N. Y. 1977), which simply cites other cases without explaining. The proposition seems to be traceable to Nacona Leather Goods Co. v. A. G. Spaulding & Bros., Inc., 159 F. Supp. 269, 270-71 (D. Del. 1958), the judge in that case simply concluded that the inconvenience to plaintiff's expert in one forum was counter-balanced by the inconvenience to defendant's expert of trial in the other forum. It was not that the two were insignificant, but that they cancelled each other out.

40. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3852, at 275 (1976).

41. *Id.*; *see* Lykes Bros. S. S. Co. v. Sugarman, 272 F. 2d 679, 681 (2d Cir. 1959); Berkshire Int'l Corp. v. Alba-Waldensian, Inc., 352 F. Supp. 831, 834-35 (S. D. N. Y. 1972) (Weinfeld, J.); Medich v. American Oil Co., 177 F. Supp. 682 (E. D. Pa. 1959) (Biggs, J., sitting by designation).

B. *Availability of Compulsory Process and Impleader*

The defendants' major factual contention when the case comes to trial will be that the fatal crash at issue was caused not by any manufacturing or design defects, but by pilot error or the negligence of the foreign air taxi service. Inability to implead foreign third-party defendants was argued vigorously here as a problem with a trial in this country, and it has, of course, generally been considered an important consideration favoring a forum non conveniens dismissal.[42] Because there is an action pending in Scotland by the decedents' estates against the appropriate Scottish defendants, which lawsuit Piper and Hartzell have consented to join as codefendants, defendants argued, and the district court concluded, that it would be unfair and unduly burdensome for them to be subjected to both trials. Although the extra burden is readily apparent, the unfairness is not. The defendants state their point as follows:

> Defendants' inability to join [the Scottish] parties as defendants in this case would seriously prejudice Defendants, through exposure to unnecessary, duplicitous litigation, and inconsistent verdicts. If Defendants are found liable here, they will be forced to file an indemnity or contribution action in Scotland against these parties. In light of the fact that Pennsylvania and Scottish law differ greatly with respect to products liability, Piper faces the substantial possibility, and great prejudice, of being held liable on a products liability theory in this case but being forced to prove negligence in an indemnity or contribution action in Scotland. Even if the same standard of liability is applied in this action and in an

42. *See Gilbert*, 330 U. S. at 511; Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976).

> indemnity or contribution action in Scotland, Defendants run the substantial risk that different juries will find different facts and, hence, produce inconsistent results.[43]

If the defendants are found liable on strict liability here but must prove negligence against the air carrier to obtain indemnity, that is not unfair, but simply the result reached under the laws of the jurisdictions in which the two companies reside. The air taxi operates exclusively in Scotland and plans its operations and expenses according to Scottish law. Piper and Hartzell reside in strict liability jurisdictions, conduct most of their business in strict liability states, and plan accordingly.

The defendants' risk of inconsistent verdicts would only exist if neither Pennsylvania nor Scotland followed principles of res judicata. Under those principles, any subsequent verdict for plaintiffs would merge with a previous favorable judgment or be barred by a prior judgment against the plaintiffs.[44] Res judicata is clearly applicable in American jurisdictions and we may assume, in the absence of any affidavits or citations of Scottish law to the contrary, that it is followed in Scotland as well.[45]

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43. Brief of Appellee Piper at 22. Hartzell's argument on this point is simply conclusory:

> As is reinforced by the plaintiffs survivors action against the air carrier employing the pilot, the agency owning and maintaining the airplane and the estate of the pilot in Scotland, those parties should be joined as defendants and cannot be joined in the United States but could be joined in the proper Forum.

Brief of Appellee Hartzell at 13.

44. *See generally* Restatement (2d) Judgments §§ 47, 48, 68.1 (Tent. Draft No. 1, March 28, 1973).

45. Defendants submitted affidavits from Scottish counsel only on the following points of Scottish law: (1) choice of law, (2)

We therefore conclude that defendants' inability to implead other potentially liable parties would indeed make litigation here more burdensome, but defendants have not shown that it would also be unfair. It is properly a factor in their favor on the motion to dismiss, but it is not as weighty as they contend.

2. *Desirability of Viewing the Premises*

The district court concluded that, to the extent weight was to be assigned this factor, it favored defendants: "Familiarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles." [46]

It is unclear whether the trial judge in fact ascribed any significant weight to this element, and still more uncertain is what benefit a lay jury would obtain from observing the wreckage in deciding whether the plane crashed because the engine or propeller were incorrectly manufactured or the pilot was negligent. Furthermore, the topography of Scotland may, to the extent relevant, be readily proved by testimony.

D. *The Public Interest*

The parties in arguing this case, and the trial judge in deciding it, have placed the greatest importance on whether, under the applicable choice of law rules, American or Scottish law would apply to major aspects of the claims. The district court concluded that, for the most part, Pennsylvania law should apply to Piper and Scottish

45. (Cont'd.)
damages that may be awarded, (3) statutes of limitations, and (4) capacity to sue.

46. 479 F. Supp. at 734.

law to Hartzell.[47] Because application of different laws to the different defendants might confuse the jury, and because ascertainment of Scottish law would make the trial more difficult, the necessity of applying foreign law to a portion of the case was considered the "uppermost" factor favoring dismissal.[48]

As will be discussed below, we conclude that the district court erred in its choice of law determinations. But even if the district court were correct in its conclusion that a mixture of Scottish and American law would be required, dismissal would not have been justified under this Court's settled principles of forum non conveniens.

1. *The Necessity of Applying Foreign Law*

First, we held in *Hoffman v. Goberman* that "[i]t is settled that the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court. The district court was, therefore, in error in basing its action, in part at least, on this ground."[49] Although there may be cir-

47. The trial court opinion stated:

Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

479 F. Supp. at 734.

48. *See id.*

49. 420 F. 2d 423, 427 (3d Cir. 1970) (footnote omitted) (law of Netherlands Antilles involved); *accord* Mobil Tankers Co. v. Mene Grande Oil Co., 363 F. 2d 611, 615 (3d Cir.) (Venezuelan law), *cert. denied*, 385 U. S. 945 (1966); Burt v. Isthmus Dev. Co.,

cumstance in which the application of foreign law would present difficulties sufficient to favor dismissal—because of difficulties of translation or because the foreign law itself has principles unknown to our jurisprudence—we are not faced with such a case here.[50] Negligence principles are well-known on this side of the Atlantic and of course there will be no translation problems in dealing with Scottish law.

Second, if trial here would confuse the jury because a different country's law would apply to each defendant, that confusion would either not be eliminated by a trial in Scotland or would be eliminated only by unacceptable unfairness to the plaintiff. If, as is unlikely, a Scottish court as a "transferee" court would apply the same choice of law rulings as would the court here, it would have an equally difficult problem in applying the laws of different countries to different defendants. Dismissal here would not eliminate the difficulty, but only shift it to a foreign forum.

The district court, though, had the affidavit of Scottish counsel that Scotland's choice of law rule for torts was to apply the law of the place of injury to all facets of the case, and therefore Scotland probably would apply its own law to all claims. Even under the district court's choice of law analysis, requiring a mixture of American and Scottish law, it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But this Court has held that a dismissal for forum non

49. (Cont'd).

218 F. 2d 353, 357 (5th Cir.), *cert. denied*, 349 U. S. 922 (1955); *see* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 436 (D. C. Cir. 1976) (difficulty in applying German law not sufficient).

50. 420 F. 2d at 427.

conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." [51] Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

2. *Choice of Law Rules Under* Klaxon and Barrack

As a federal court deciding a case premised on diversity jurisdiction, we are required by the *Klaxon* rule [52] to apply the conflicts of law rules of the state in which we sit. We are not permitted to fashion our own rules, however more clear or salutory they might seem.[53] Complicating matters here is that, for purposes of this litigation

51. De Mateos v. Texaco, Inc., 562 F. 2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U. S. 904 (1978). The point is made by Professor Bickel in terms of fairness to the plaintiff. *See*, Bickel, *supra* note 11, at 28 & n. 68 (because premise of forum non conveniens is existence of jurisdiction, "a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true").

52. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U. S. 487, 496 (1941).

53. The Supreme Court reaffirmed *Klaxon* in strong terms in Day & Zimmermann, Inc. v. Challoner, 423 U. S. 3, 4 (1975) (per curiam) (reversing appellate court determination that, as a matter of federal choice of law, a federal court could not apply the choice of law rule of the state in which it sat if that jurisdiction had no policy interest in the case). Thus the Court has, at least for now, answered scholarly criticism of *Klaxon* and exhortations that it be overruled. *See, e.g.*, Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 32-42 (1963); Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U. C. L. A. L. Rev. 1191 (1967); *cf.* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 713-18 (2d ed. 1973) (making point by rhetorical questions).

and its choice of law problems, we are in effect "sitting" in two different states. Moreover, though not entirely disinterested, each state is in the position of choosing between the laws of two other states.

The action against Piper was transferred under § 1404(a) from California to Pennsylvania. The law of the transferor forum—*i.e.*, California's choice of law rules—should therefore, under *Van Dusen v. Barrack*,[54] be applied as to Piper.

Hartzell's situation is more complex. The California district court ruled that personal jurisdiction over Hartzell was lacking, both under California law and the Due Process Clause. The court did not dismiss the case against

54. 376 U. S. 612 (1964). The *Barrack* rule—that a transfer should work no change in the applicable law—is a "general" one. the Court added this qualifier:

> [W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens* . . . .

Id. at 639-40 (footnote omitted). Piper does contend that California court would have dismissed this action on the ground of forum non conveniens. This is implicit in its argument that we should now dismiss the case on that ground and that California law on this issue is the same as the federal law on which the issue has generally been argued. Both Piper and Reyno agree, however, that California's choice of law rules govern the case as to Piper. To follow the Court's caveat would, moreover, be inefficient and wasteful of judicial resources, for it would require the transferee court, after the transferor court had granted a 1404(a) transfer, to examine the transferor State's law to ascertain whether the defendant should have brought a motion to dismiss rather than to transfer in the first place. *See In re* Air Crash Disaster at Boston, Massachusetts on July 31, 1973, 399 F. Supp. 1106, 1121-22 (D. Mass. 1975).

Hartzell, but rather quashed service of process and ordered transfer to Pennsylvania along with codefendant Piper. Although this Court has held that transfer under § 1404(a) is proper even though the transferor state lacked personal jurisdiction,[55] that does not resolve the problem whether the *Klaxon* and *Barrack* rules would still require us to apply the choice of laws rule of the transferor state.

To state the problem is, we believe, to explain why California's law may not apply to Hartzell: if California's exercise of jurisdiction would violate due process, so would application of that state's choice of law rules.[56] Furthermore, *Barrack* is not so rigid. The Court there stated as a *general* rule of statutory construction of § 1404(a) that, to be "in the interest of justice," a transfer should not work a change in the applicable law.[57] We conclude that this

55. In Goldlawr, Inc. v. Heiman, 369 U. S. 463, 466 (1962), the Supreme Court held that transfer for improper venue under 28 U. S. C. § 1406(a) was proper whether or not the court in which the motion was filed had personal jurisdiction over the defendants. *Cf.* Martin v. Stokes, No. 78-3390, slip op. at 5-6 (6th Cir. filed June 19, 1980) ("following a transfer under § 1406(a), the transferee district court should apply its own state law rather than the state law of the transferor district court") (citing cases). This Court applied *Goldlawr* by analogy to § 1404(a) and held that if lack of both venue and personal jurisdiction could not defeat a transfer, then want of the latter alone could not. United States v. Berkowitz, 328 F. 2d 358, 361 (3d Cir.), *cert. denied*, 379 U. S. 821 (1964).

56. *See* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94, 103 (1976) (forum must have reasonable due process basis for applying own law, which does not exist if party opposing application of forum's law has no minimum contacts with forum, the transaction giving rise to the claim is not connected with the forum, or application of the forum's law would otherwise be manifestly unfair).

57. The plaintiff in the *Barrack* case challenged, by writ of mandamus, the district courts order transferring the case from Pennsylvania to Massachusetts. He contended that the transfer

case comes within an exception, the possibility of which was noted in *Barrack*,[58] to the application of the transferor state's law. As with any other statute, we must construe § 1404(a) to avoid any constitutional problem,[59] and so hold that when there has been an interstate transfer without personal jurisdiction, the transferor state's choice of law does not apply to that defendant. Because Pennsylvania does have personal jurisdiction, it is that state in which the federal court is located for the *Klaxon* purpose of finding the choice of law rules governing the case as to Hartzell.

Our analysis so far does not differ from that of the district court, which held that California's choice of law rules applied to Piper and Pennsylvania's rules applied to Hartzell.[60] The court went on to hold that under California's governmental interest approach the Scottish law of wrongful death would apply to make Reyno an improper litigant, but Pennsylvania's law of strict liability rather than Scotland's negligence law would govern the theory

57. (Cont'd.)
could not be, as § 1404(a) requires, "in the interest of justice," because it was likely to be accompanied by a prejudicial change in the state law to be applied. 376 U. S. at 626. The distirct court had held that transfer could be ordered regardless of the possibility of a change in law, *id.* at 626-27, our Court agreed with the plaintiff that it could not, *see* Barrack v. Van Dusen, 309 F. 2d 953 (3d Cir. 1963), and the Supreme Court, disagreeing with both the trial and appellate courts, reversed. A transfer would not be unfair, it held, because "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." 376 U. S. at 639.

58. *See* note 54 *supra*.

59. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U. S. 490, 507 (1979).

60. 479 F. Supp. at 734.

of the tort.[61] Pennsylvania's significant contacts approach was thought to require that Scottish law apply to all facets of the claim against Hartzell.[62] We must examine these rulings to determine whether they are erroneous as a matter of law.

a. *California Conflicts Law Applied to Piper*

California was a pioneering state in the governmental interest analysis approach to choice of law that was developed by Professor Currie.[63] In *Reich v. Purcell*,[64] the California Supreme Court abandoned the traditional view that the law of the place of wrong (injury) must be applied in tort actions regardless of the issues, and established in its stead the principle that "[t]he forum must search to find the proper law to apply based upon the interests of the litigants and the involved states."[65]

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61. The district court relied primarily on Reich v. Purcell, 67 Cal. 2d 551, 432 P. 2d 727, 63 Cal. Rptr. 31 (1967); and Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P. 2d 666, 114 Cal. Rptr. 106 (1974), while mentioning in passing Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U. S. 859 (1976), 479 F. Supp. at 735-36.

62. *See* 479 F. Supp. at 736-37 (relying on Griffith v. United Airlines, 416 Pa. 1, 203 A. 2d 796 (1964); and Lewis v. Chemetron, 448 F. Supp. 211 (W. D. Pa. 1978)).

63. Professor Brainerd Currie is generally considered to be the father of modern governmental interest analysis. *See* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U. S. 859 (1976); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 Vand. L. Rev. 717, 720 (1980); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392, 392-93 (1980). Most of his writing on the subject is collected in B. Currie, Selected Essays on the Conflict of Laws (1963).

64. 67 Cal. 2d 551, 432 P. 2d 727, 63 Cal. Rptr. 31 (1967).

65. 67 Cal. 2d 553, 432 P. 2d at 729, 63 Cal. Rptr. at 33.

Also integral to the holding in *Reich v. Purcell* was the introduction into California law of the concept of "false conflicts."[66] In *Reich*, the wrongful death action arose from an automobile accident that occurred in Missouri between an Ohio plaintiff and a California defendant. Missouri, the state of injury, limited compensation for wrongful death, but neither California nor Ohio had any limitation. The California Supreme Court held that as to the issue of the extent of damages, as opposed to the standard of conduct on which liability was based, there was no true conflict in governmental interests. Since California had no limitation on damages, it had no interest in protecting its resident defendant from a higher recovery. Moreover, the defendant's California insurance policy would be calibrated to the potential burdens of larger claims. Missouri had an interest in the standard of conduct for behavior within its borders, but its interest in limiting damages was solely to protect in-state defendants. It had no substantial interest in extending that protection to defendants from states with no such limitations, and Ohio, as the state where the decedents' estates were probated, did have a substantial interest in unlimited recovery. Therefore, Ohio's law as to the damage issue was applied.[67]

66. The term was not explicitly used in that case, but the methodology was. *See id.* at 555-56, 432 P. 2d at 730-31, 63 Cal. Rptr. at 34-35, Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U. S. 859 (1976).

67. Reich v. Purcell, 67 Cal. 2d 551, 432 P. 2d 727, 731, 63 Cal. Rptr. 31, 35 (1967), *see* Hurtado v. Superior Court, 11 Cal. 3d 574, 581-83, 522 P. 2d 666, 670-71, 114 Cal. Rptr. 106, 110-11 (1974) (false conflict between plaintiffs' state's limitation of damages and defendant's state's allowance of full recovery; full recovery allowed). The false conflicts methodology is also attributable to Professor Currie, as well as Professor Cavers, *see* B. Currie, *supra* note 62, at 189; D. Cavers. The Choice-of-Law Process 89-90 (1965), both of whom are extensively cited in *Hurtado*.

Subsequent cases indicate a further refinement of the governmental interest and false conflict methodology termed a "comparative impairment" approach.[68] This approach comes into practice only after a "'preliminary analysis has identified a true conflict of the government interests involved.'" Once this preliminary step is satisfied, the court resolves a true conflict by "'determin[ing] which state's interest would be more impaired if its policy were subordinated to the policy of the other state . . . . [T]rue conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied.'"[69]

Among the relevant factors to be considered in determining choice of law under California's comparative impairment approach are the following:

> (1) The status of the law—whether it is to be considered anachronistic or ascendant in the common law jurisdictions. "'If one of the competing laws is archaic and isolated . . ., it may not unreasonably have to yield to the more prevalent and progressive law, other factors of the choice being roughly equal.'"[70]

(2) Insurance and other planning for risks. Parties may be expected to plan their activities with in-

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68. Offshore Rental Co. Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P. 2d 721, 726, 148 Cal. Rptr. 867, 872 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d at 321, 546 P. 2d at 723-24, 128 Cal. Rptr. at 219-20 (1976).

69. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P. 2d 721, 726, 148 Cal. Rptr. 867, 872 (1978) (quoting *Bernhard, supra* note 68).

70. *Id.* (emphasis deleted) (quoting Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1216 (1946).

surance in mind, and that planning may affect the comparative fairness of two competing rules of liability.[71]

As we have mentioned, the district court divided the case against Piper into distinct issues, and ruled that a California court would apply its law as to one and Scottish law as to others. He then employed what conflicts scholars refer to as *depecage*, defined as "the process of applying the rules of different states to determine different issues in the same case." [72] Although the California Supreme Court has not explicitly adopted this method, it is implicit in that court's analysis of cases and it is consistent with modern governmental interest analysis to examine comparative governmental interests as to each issue, to the extent the issues are separable and the balance of comparative interests may vary.[73] We shall therefore examine separately the issues identified by the parties and the district court: the standard of liability, damages for wrongful death, and the capacity of the plaintiff to bring a wrongful death suit as a representative.

Any asserted conflict between American strict liability and Scottish negligence law is, we believe, a false one. Two basic policies underly theories of tort liability: deterrence of harm-causing conduct and compensation of persons injured by that conduct. In private tort law, in which civil rather than criminal liability is imposed, the

71. *Id.* at 167, 583 P. 2d at 734, 148 Cal. Rptr. at 872.

72. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58, 75 (1973); *see* Broome v. Antler's Hunting Club, 595 F. 2d 921, 923 (3d Cir. 1979); R. Leflar, American Conflicts Law § 109, at 221-22 (3d ed. 1977).

73. *See* R. Leflar, *supra* note 72, at 222; Reese, *supra* note 72, at 75. The approach is also implicit in the analysis of Professor Cavers, whose work is often cited by the California Supreme Court. *See* D. Cavers, *supra* note 67, at 40-43.

deterrent function is accomplished by compensation of the plaintiff. The choice between holding a manufacturer liable only for negligence and holding it strictly liable for any dangerous products or design is, practically speaking, a matter both of searching for optimal deterrence of harmful conduct and of allocating the costs of injuries either to producers or consumers. A negligence standard is, broadly speaking, more protective of producers, while strict liability is more solicitous of consumers.

The perceived conflict in this case is between Scotland's interest in encouraging industry by protecting manufacturers and making it relatively more difficult for consumers to recover. Pennsylvania, by contrast, in adopting strict liability, has shifted some of the burdens of injuries from consumers to producers. By adopting this policy of increased deterrence, it hopes to make manufacturers more careful in production and design than they would be if held to a negligence standard.[74]

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74. In a recent case in which the California Supreme Court adopted comparative negligence into strict liability, the underlying policy of the latter was said to be to shift the cost of injuries from defective products from consumers to manufacturers. But the court emphasized that strict liability is not absolute liability and does not make the manufacturer an insurer of his product's safety. Daly v. General Motors Corp., 20 Cal. 3d 725, 733, 575 P. 2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978). In addition to spreading the costs of accidents, strict liability is intended to increase a manufacturer's incentive to produce safe products. *See id.* at 737-38, 575 P. 2d at 1169, 144 Cal. Rptr. at 387. *See* Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L. J. 656 (1975) (strict liability better serves goal of optimal deterrence—minimization of accident and prevention costs); Calabresi & Hirschoff *Toward a Test for Strict Liability in Torts*, 81 Yale L. J. 1055, 1074-84 (1972) (shift from negligence to strict liability cannot be explained simply in terms of better distribution of costs; strict liability's appeal is also in greater deterrence of harmful conduct); *cf.* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1121, 1122

Applying Pennsylvania's strict liability standard to its resident manufacturer would serve that state's interest in the regulation of manufacturing. Scotland's interest in encouraging industry within its borders would not be impaired, however, by applying a stricter standard of care on a foreign corporation which has no industrial operations in Scotland. Furthermore, Scotland would have to interest in *denying* compensation to its residents for the purpose of benefiting a foreign corporation. Finally, imposition of strict liability on Piper cannot be said to be unfair to it. Inasmuch as Pennsylvania, the state in which Piper makes its product, and the vast majority of American jurisdictions in which most of Piper's aircraft are sold and fly, have strict liability,[75] that is the legal standard under which it plans its operations.

Pennsylvania's interest in deterring defects in products can be served without impairing any significant interest of Scotland. Application of Scotland's negligence law would only harm resident beneficiaries without any countervailing benefit to its industrial economy. We therefore conclude that, as between Pennsylvania and Scottish law on this issue, a California court would apply Pennsylvania's strict liability standard. Similar considerations would govern any greater restrictions on recovery for wrongful death that Scotland may have.[76]

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74. (Cont'd.)

(1980) (one argument that has convinced courts is that supplier of goods should be responsible for the harm they cause, regardless of fault).

75. *See, e.g.*, Wade, *On Product "Design Defects" and Their Actionability*, 33 Vand. L. Rev. 551, 555 (1980) (major point of controversy in America is no longer whether strict liability should be adopted, but what its precise standards should be).

76. Courts employing governmental interest analysis have not struggled long to determine that a state where plaintiff but not defendant resides has no interest in restricting recovery for wrongful death of its citizens against foreign corporations. *See, e.g.*, Hurtado

The district court declined to make any definitive ruling on the issue of plaintiff's capacity to sue because of the paucity of available information for balancing comparative governmental interests. 479 F. Supp. at 735. There was thought to be no need to decide this question, because the court concluded for other reasons that the action should be dismissed and brought anew in Scotland.[77]

Because we reverse the dismissal, it will be necessary for the trial judge to decide that issue based upon additional information. If it is held that Reyno does not have representative capacity, it will be necessary to allow a substitution of parties so that the decedents' estates can bring the action directly. Such a substitution would not destroy diversity and should be granted in the interests of justice.[78]

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76. (Cont'd.)

v. Superior Court, 11 Cal. 3d 574, 522 P. 2d 666, 114 Cal. Rptr. 106 (1974); *Cf.* Rosenthal v. Warren, 475 F. 2d 438 (2d Cir.) (applying New York government interest analysis; New York forum would apply its own unlimited recovery rather than limitation of state of defendant where all tortious conduct occurred), *cert. denied*, 414 U. S. 856 (1973); Kuhne, *Choice of Law in Products Liability*, 60 Calif. L. Rev. 1, 28 (1972) ("Under a governmental-interest approach, [a] proplaintiff tendency will be conceptualized . . . by imputing a greater state interest to recovery law than to those refusing recovery.")

77. On the choice of law issue as to representative capacity, the court stated: "We . . . only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make . . . any defnitive ruling on the purpose of the Scottish law or thereby the choice of law." 479 F. Supp. at 735. It later concluded only that "it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation Plaintiff would not be a proper litigant." *Id.* at 736.

78. Fed. R. Civ. P. 17(a); *see* Field v. Volkswagenwerk AG, No. 79-1710, slip op. at 24-25 (3d Cir. July 10, 1980).

Guiding the trial judge's decision should be the requirement of Fed. R. Civ. P. 17(b) that the capacity of an individual to sue in a representative capacity "shall be determined by the law of the state in which the district court is held."[79] In addition to examining the laws of California and Pennsylvania to determine whether Reyno has representative capacity,[80] the trial court should consider whether the defendants' challenge to the plaintiff's capacity to sue has come too late in the litigation.[81]

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79. Rule 17(b) in full provides:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held,* except [(1) a special rule for partnerships and other unincorporated associations; and (2) bankruptcy receivers].

(emphasis added); *see* General Heat & Power Co. v. Diversified Mortgage Investors, 552 F. 2d 556, 557 n. 1 (3d Cir. 1977) (suggesting that Rule 17(b) encompasses the state's conflict of law rules under *Klaxon*); Jacobs v. Adams, 601 F. 2d 176, 178-79 (5th Cir. 1979) (applying conflicts of laws rule to determine scope of power or right to bring suit).

80. The court "is held" in California as to Piper and in Pennsylvania as to Hartzell. *See* pp. 24-26 *supra.*

81. Fed. R. Civ. P. 9(a) requires that a party desiring to raise an issue as to "the capacity of any party to sue . . . or the authority of a party to sue . . . in a representative capacity . . . do so by specific negative averment." The federal rules do not make clear when in the stage of a litigation lack of capacity must be averred, but because lack of capacity is a dilatory defense, Professors Wright and Miller state that it "should be raised promptly. Any unreasonable delay may encourage the court to deny the objection on the ground of prejudice." 6 C. Wright & A. Miller, Federal Practice and Procedures § 1542, at 640 (1971) (footnote omitted). *See* 5 *Id.* § 1295, at 397 (objection to party's capacity should be analo-

b. *Pennsylvania Conflicts Law Applied to Hartzell*

Citing *Griffith v. United Airlines,*[82] the district court applied the "significant contacts" approach to determine that Scotland's standard of liability, rather than that of Ohio or Pennsylvania, applied to Hartzell.[83] But a close examination of *Griffith* and, more importantly, subsequent elaborations by the Pennsylvania Supreme Court reveals that Pennsylvania's approach to choice of law is quite similar, at least for purposes of this litigation, to that of California. Pennsylvania first looks to identify and thus avoid false conflicts, and then, when a true conflict is present, exmaines and compares the competing governmental interests.

In *Griffith,* the Pennsylvania Supreme Court overturned the old rule that the law of the state of wrong governs all issues in tort actions,[84] but it did not specifically set forth the contours of that rule's replacement. In fact,

81. (Cont'd.)
gized to an affirmative defense and waived if not asserted early in the litigation by motion or responsive pleading). The record reveals that Reyno's capacity was not challenged by Piper until it joined Hartzell's motion to dismiss after the case had been transferred to the Middle District of Pennsylvania. This motion came after Piper had moved to remove the case from a California state court to a federal court, had filed its answer to the complaint, and had successfully moved to transfer the case to the Middle District of Pennsylvania.

82. 416 Pa. 1, 203 A. 2d 796 (1964).

83. 479 F. Supp. at 736-37. All three jurisdictions have contacts with or interests in the alleged tort. Scotland is the residence of the decedents and the place of the fatal crash. Hartzell manufactured the allegedly defective propeller in Ohio and it was assembled into the Piper aircraft in Pennsylvania.

84. 416 Pa. at 21-23, 203 A. 2d at 805-06.

as the court later indicated, once governmental interests were examined *Griffith* involved a false conflict situation.[85] The state in which an airplane crashed was held to have no interest in enforcing its limitation of damages for wrongful death when neither party was a resident.[86]

The Pennsylvania Supreme Court noted three general approaches competing to replace the old rule: (1) Professor Currie's early emphasis on applying the forum's law when the forum has a legitimate interest in the issue presented;[87] (2) Professor Ehrenzweig's stress on the interests of the parties, specifically looking to whether the defendant would have planned by insurance for the risks to which he would be exposed by the applicable law;[88] and (3) the "significant contacts" approach of the Restatement (Second) of Conflicts, under which a court applies the law of the state with the most significant relationship with the occurrence and the parties.[89] Rather than choose among these alternative approaches, the Pennsylvania Supreme Court adopted what it believed was the essence of all three: "a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court."[90]

Subsequent cases confirm that Pennsylvania courts follow a governmental interest analysis approach, with a

85. Kuchinic v. McCrory, 422 Pa. 620, 624 & n. 4, 222 A. 2d 897, 899 n. 4 (1966).

86. *Griffith*, 416 Pa. at 24, 203 A. 2d at 807.

87. *Id.* at 14, 203 A. 2d at 802 (citing Currie, *Comments on* Babcock v. Jacksons, 63 Colum. L. Rev. 1212, 1233 (1963)).

88. *Id.* (citing Ehrenzweig, *Comments on* Babcock v. Jackson, 63 Colum. L. Rev. 1212, 1243 (1963)).

89. *Id.* at 14-15, 203 A. 2d at 802-03 (citing Restatement (2d) Conflict of Laws §§ 379, 389a (1971) and writings of its Reporter, Professor Reese).

90. *Id.* at 21, 203 A. 2d at 805 (footnote omitted).

state's contacts being considered significant only when the behavior giving rise to the contact furthers or abrogates a state policy. Where the place of accident is fortuitous and the state where the accident occurred has no interest in the regulatory standard at issue, any conflict between that state and a state truly interested because, for example, it constituted the residency of the parties is, Pennsylvania appears to suggest, a false one.[91]

In *McSwain v. McSwain*, the court stated its approach as follows:

> Whether the policies of one state rather than another should be furthered in the event of conflict can only be determined within the martix of specific litigation. What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.[92]

The latest discussion in *Cipolla v. Shaposka* [93] summarized the approach of the three cases discussed above as calling upon the court to determine which state "has the greater interest in the application of its law to the question now before us." Moreover,

> In determining which state has the greater interest in the application of its law, one method is to see what contacts each state has with the accident, the contacts being relevant only if they relate to the "policies and interests underlying the particular issue before the court." When doing this it must be re-

91. Kuchinic v. McCrory, 422 Pa. at 624 & n. 4, 222 A. 2d at 899 & n. 4.

92. McSwain v. McSwain, 420 Pa. 86, 94, 215 A. 2d 677, 682 (1966) (citing *Griffith*, as well as California and New York cases).

93. 439 Pa. 563, 565, 267 A. 2d 854, 855 (1970).

> membered that a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale.[94]

These cases indicate to us that the primary approach of the Pennsylvania Supreme Court in choice of law is governmental interest analysis. Our determination as to whether the Pennsylvania court would apply American strict liability and unlimited recovery for wrongful death, rather than the negligence and damage limitations law of Scotland, therefore follows our prediction of California law. Indeed, the district court ruled that American standards of liability would control under governmental interest analysis applied as to California.[95] It is apparent,

94. *Id.* at 566, 267 A. 2d at 856 (quoting *Griffith*, 416 Pa. at 21, 203 A. 2d at 805).

95. There is some difference between California and Pennsylvania, on the one hand, and Ohio on the other as to the standard of proof in strict liability. Ohio has adopted in full Restatement (2d) Torts 402A, subjecting to liability one who sells a product in a defective condition "unreasonably dangerous." *See, e.g.*, Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N. E. 2d 267, 168 (1977) (Syllabus by the Court); *cf.* Anton v. Ford Motor Co., 400 F. Supp. 1270, 1273-76 (S. D. Ohio 1975) (reviewing products liability decisions of the Ohio Supreme Court). Pennsylvania and California have removed the "unreasonableness" requirement as being inconsistent with the policy of strict liability. *See e.g.*, Barker v. Lull Eng. Co., Inc., 20 Cal. 3d 413, 423-27, 573 P. 2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A. 2d 1020 (1978). Indeed, our Court in interpreting Pennsylvania law has repeatedly held that use in a jury charge of the Restatement 2d's "unreasonably dangerous" language is reversible error. *E.g.*, Matlocks v. Daylin, Inc., 611 F. 2d 30 (3d Cir. 1979); Bailey v. Atlas Powder Co., 602 F. 2d 585 (3d Cir. 1979). Giving separate charges on the Ohio standard for Hartzell and the Pennsylvania standard for Piper need not necessarily confuse the jury.

then, that the district court erred in concluding that foreign law would govern a substantial part of the case, and it is likewise apparent that the choice of law factor weighted heavily in favor of dismissal for forum non conveniens.

E. *Other Elements of Public Interest*

We have held that under the applicable choice of law rules, Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute. It follows that any other public interest factors that should be considered under the Supreme Court cases of *Gilbert* and *Koster* favor trial in this country rather than Scotland.

III. Conclusion

Because the defendants did not meet the burden required of them for a forum non conveniens dismissal, the judgment of the district court will be reversed and the cause remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

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(D. C. Civil No. 77-1159)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel, on May 22, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 19, 1979, be, and the same is hereby reversed and the cause is remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

/s/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

July 24, 1980

ORDER OF THE COURT OF APPEAL SUR PETITION FOR REHEARING EN BANC

Filed August 27, 1980
[caption omitted in printing]

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Appellee, Hartzell Propeller, Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ ARLIN M. ADAMS
Arlin M. Adams
Circuit Judge

Dated: August 27, 1980

UNITED STATES COURT OF APPEALS
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No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehily, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
C. A. No. 77-1159

Argued May 22, 1980
Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the slip opinion filed July 24, 1980 in the above matter be and is hereby amended as follows:
Page 7, first paragraph
should read:

At the time of the transfer motion, critical facts such as where various witnesses are, where the crash occurred, where the wreckage was located, and who owned the plane, were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum non conveniens motion, they are hardly surprising or significantly new.

BY THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: September 15, 1980